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INDEX

Page

Absolutely Great Radio, Inc.; re Spousal attribution permitted for integration purposes where spouses file as joint tenants for estate planning purposes, BC Docket No. 80-366, (FCC 86-250)........ 1

Amateur Operator Examinations; re Petitions for partial reconsideration of *Report and Order*, 50 FR 38816, Sept. 25, 1986, denied PR Docket No. 85-21, (FCC 86-242)........ 720

Amateur Radio Service; re *Notice of Proposed Rule Making* adopted regarding expansion of privileges available to novice operators PR Docket No. 86-161, (FCC 86-192)........ 375

Amendment of Part 1; re Improved efficiency and clarity of informal complaints (FCC 86-153)........ 12

Amendment of Parts 1 and 73; re Publication of summaries of hearing designation orders in the Federal Register, (FCC 86-241)........ 724

Amendment of Parts 1, 63, and 76; re Petitions for partial reconsideration of *Report and Order, 50 FR 18637*, denied, MM Docket No. 84-1296, (FCC 86-277)........ 386

AT&T; re Petition for reconsideration of the Commission's *Memorandum Opinion and Order* (FCC 85-197) regarding delegation of authority to Chief, Common Carrier Bureau, (FCC 86-158)........ 733

AT&T; re Petitions for reconsideration of *AT&T Structural Relief Order*. 102 FCC 2d 655, denied, CC Docket No. 85-26, (FCC 86-341)........ 739

AT&T Communications; re Petitions for reconsideration of Commission's action on May 28, 1985, denied, CC Docket No. 85-400, (FCC 86-273)... 773

Barton B/cing Co.; re No diversification preference awarded for local weekly newspaper interest, MM Docket No. 84-728, (FCC 86R-31)........ 785

Barton B/cing Co.; re Applications for construction permit for a new FM station, MM Docket No. 84-728, (FCC 85D-68)........ 793

B/cing and VHF Aeronautical Services; re Proceeding terminated investigating interference-related compatibility problems, MM Docket No. 85-108, (FCC 86-162)........ 410

B/c Network Affiliation; re Petition for reconsideration denied, MM Docket No. 85-350, (FCC 86-256)........ 804

Beacon Broadcasting; re Review Board affirmed ALJ's determination, MM Docket No. 84-1309, (FCC 86R-32)........ 808

Beacon Broadcasting; re Applications for construction permit for AM station, MM Docket No. 84-1309, (FCC 85D-73) 811

Broadcast Assn. of Colorado; re FCC modifies Review Board Decision pursuant to recently adopted *Policy Regarding Character Qualifications in Broadcast Licensing*, FCC 85-648, MM Docket No. 83-1218, (FCC 86-215) 16

Cable TV Hardware; re *Notice of Proposed Rulemaking* adopted, CC Docket No. 86-212, (FCC 86-274) 412

Caldwell Broadcasting Corp.; re Application for review denied, BC Docket No. 82-453, (FCC 86-245) 438

Calhoun County B/cing Company; re Review Board grants renewal applications with a condition, MM Docket No. 84-903, (FCC 86R-34) 22

Calhoun County B/cing Company; re Applications for renewal of license, MM Docket No. 84-903, (FCC 86D-19) 27

Chester Associates; re Review Board affords parties in adjudicatory proceeding opportunity to comment, MM Docket No. 84-525, (FCC 86R-35) 443

Chester Associates; re Review Board remands proceeding, MM Docket No. 84-525, (FCC 86R-48) 822

Comark Cable Fund III; re Petition for Stay Pendite Lite granted to an extent, (FCC 85-634) 451

Cost Allocations; re *Notice of Proposed Rulemaking* adopted concerning enhanced services, CPE, etc., CC Docket No. 86-111, (FCC 86-146) 59

Cotton B/cing Co.; re Review Board reverses ALJ's decision, MM Docket No. 85-49, (FCC 86R-42) 473

Cotton B/cing Co.; re Applications for construction permit for new TV station, MM Docket No. 85-49, (FCC 86D-16) 479

Debra D. Carrigan; re Applications for Class C FM station, MM Docket No. 83-858, (FCC 86-317) 826

Deregulation of Radio; re Local public inspection file of commercial stations, BC Docket No. 79-219, (FCC 86-222) 505

Detariffing of Customer Premises Equipment; re Petition for Clarification or Further Partial Reconsideration of Reconsideration Order, 50 FR 9016 (March 6, 1985) granted, CC Docket No. 81-893, (FCC 86-238) 509

Digital Electronic Message Service; re Petition for reconsideration denied, CC Docket No. 85-40, (FCC 86-175) 836

Domestic Fixed Radio; re *Notice of Proposed Rulemaking* adopted seeking to revise Part 21 governing construction, licensing, and operation of facilities, CC Docket No. 86-128, (FCC 86-154) 116

Donovan-Burke; re Request for waiver denied, (FCC 86-180) 843

Dorothy J. Owens; re Review Board denies appeal and affirms ALJ's ruling, MM Docket No. 85-267, (FCC 86R-46) 848

Dorothy J. Owens; re Review Board denies stay of order, MM Docket No. 85-267, (FCC 86R-37) 157

FM Broadcast Assignments; re *Fourth Report and Order* adopting amending Part 73 of Commission's rules regarding the FM Table of Allotments, MM Docket No. 84-231, (FCC 86-210) 517

FM Technical Rules; re *Notice of Proposed Rulemaking* adopted to review and correct inconsistencies in Part 73, subpart B, MM Docket No. 86-144, (FCC 86-169) 160

Forus FM B/cing N.Y. Inc.; re Petition for Reconsideration of Commission's *Order*, FCC 85-234, adopted April 30, 1985, denied, (FCC 86-171) 529

Hispanic Owners, Inc.; re Application for Class C FM station, Sec. 307(b), BC Docket No. 82-570, (FCC 86-316) 861

Independent Masters, Ltd.; re Review Board affirms *I.D.* grant of TV application, MM Docket No. 83-1246, (FCC 86R-33) 178

Independent Masters, Ltd.; re Applications for construction permit, MM Docket No. 83-1246, (FCC 85D-62) 195

International Communications Policies; re *Report and Order* adopted extending Recognized Private Operating Agencies status to enhanced service providers, etc., CC Docket No. 83-1230, (FCC 86-220) 208

Interstate Rate of Return; re *Notice of Proposed Rulemaking* adopted seeking to establish reporting requirements, CC Docket No. 86-127, (FCC 86-157) 273

Local Area Networks; re *Notice of Proposed Rulemaking* adopted, PR Docket No. 86-174, (FCC 86-219) 533

Macfadden Acquisition Corp.: re Request for issuance of special temporary authority denied, Motion to Dismiss or Deny granted, (FCC 86-225) 545

Mid-Ohio Communications, Inc.; Review Board reverses *I.D.* and denies renewal application for Station WBBY(FM), BC Docket No. 82-282, (FCC 86R-41) 572

Mid-Ohio Communications, Inc.; re Application for construction permit, BC Docket No. 82-282, (FCC 85D-75) 604

MTS/WATS Market Structure; re Petition for Reconsideration of *Alternative Tariff Order*, 50 FR 13028, April 2, 1985, denied, CC Docket No. 78-72, (FCC 86-261) 627

Multipoint Distribution Service; re *Notice of Proposed Rulemaking* adopted seeking to delete both fifty percent rules, Secs. 21.903(b)(2), & 21.903(b)(1), CC Docket No. 86-179, (FCC 86-226) 283

Multipoint Distribution Service; re *Order* adopted amending procedural rule concerning frequency allocation to various services, Gen Docket No. 80-112, (FCC 86-225) 634

New Orleans Channel 20, Inc.; re Third application for extension of time, (FCC 86-266) 304

Noncommercial FM Translators; re *Notice of Proposed Rulemaking* adopted seeking to permit rebroadcast signals relays by satellite or terrestrial microwave facilities, MM Docket No. 86-112, (FCC 86-147) 318

Pappas Telecasting of Carolinas; re Waiver of Section 73.1130 granted subject to conditions, (FCC 86-330) 865

Progressive Communications, Inc.; re Review Board remands proceeding to ALJ to ascertain whether applicant "losing" transmitter site can show good cause for amendment, MM Docket No. 84-352, (FCC 86R-36) 329

Progressive Communications, Inc.; re Applications for construction permit for new FM station, MM Docket No. 84-352, (FCC 85D-57) 336

Radiodetermination Satellite Service; re Petitions for reconsideration and petition for clarification of *Report and Order, 50 FR 39101*, granted to an extent, Gen Docket No. 84-689, (FCC 86-163) 637

Receive-Only Earth Stations; re *Second Report and Order* adopted further streamlining licensing procedures, CC Docket No. 78-374, (FCC 86-133) . 348

Riverside B/cing Co., Inc.; re *Memorandum Opinion and Order* adopted granting license renewal application, (FCC 86-236) 644

RRAD, Inc.; re Tie-breaker lottery, CC Docket No. 84-1272, (FCC 86-313) . 876

RRAD, Inc.; re Applications for construction permits for new station, CC Docket No. 84-1272, (FCC 85D-69) 891

Satellite Communications; re *Second Report and Order* adopted amending Part 25 of Commission's rules, Gen. Docket No. 84-689, (FCC 86-209) ... 650

Satellite Communications; re *Memorandum Opinion and Order* adopted denying the Petition for Reconsideration and dismissing Motion for Stay, (FCC 86-260) 672

Silver Star Communications; re Applicant directed to show cause why licenses of WMJM&WFAV-FM should not be revoked, (FCC 86-172).... 898

SMR Systems; re *Notice of Proposed Rule Making* adopted proposing to amend Part 90 of Commission's rules, PR Docket No. 86-160, (FCC 86-213) 677

Specialized Mobile Radio; re Petition to simplify current licensing for end users of SMR systems dismissed, (FCC 86-231) 902

Stearns County B/cing Co., Inc.; re Application dismissed, MM Docket No. 84-1256, (FCC 86R-40) 688

Stearns County B/cing Co., Inc.; re Application for construction permit for new FM station, MM Docket No. 84-1256, (FCC 86D-12) 700

Suburbanaire, Inc.; re Review Board reversed ALJ's grant, MM Docket No. 84-418, (FCC 86R-47) 909

Suburbanaire, Inc.; re Applications for construction permit for new AM station, MM Docket No. 418, (FCC 86D-18) 921

Tampa Broadcasting Corp.; re Exemption from LPTV application acceptance standard denied, (FCC 86-311) 941

Telecommunications Procedures; re *Declaratory Ruling* adopted (FCC 86-254) 945

Television Deregulation; re Petitions for reconsideration of 98 FCC 2d 1076, denied, MM Docket No. 83-670, (FCC 86-223) 357

Third Computer Inquiry; re *Report and Order and Supplemental Notice* adopted, CC Docket No. 85-229, (FCC 86-252) 958

SUBJECT DIGEST

Amateur Operator, Examination

Memorandum Opinion and Order adopted denying the petitions for partial reconsideration filed by the American Radio Relay League and David B. Popkin concerning the Report and Order, *50* FR *38816*. Sept. 25, 1985, removing the waiting period of thirty days before an amateur operator applicant could retake an exam. The Commission feels that it has responded adequately to the petitioners' concerns by revising the PR Bulletin 1035A and that the rule removal does not diminish the integrity of the novice examination system.

—Amateur Operator Examinations
PR Docket No. 85-21

Application, Defective

The Commission will not grant an exemption from the low power television "complete and sufficient" application acceptance standard on the basis of the minority status of the applicant.

—Tampa Broadcasting Corp.

Authority Delegated, Action On

Memorandum Opinion and Order adopted denying AT&T's petition for reconsideration of the Commission's Memorandum Opinion and Order (FCC 85-197) regarding the delegation of authority to the Chief, Common Carrier Bureau. AT&T also sought to limit the previous Order's applicability to non-proprietary information. The Commission's feels that the delegation of authority was properly adopted.

—AT&T

Common Carrier

Memorandum Opinion and Order for Reconsideration of the *AT&T Structural Relief Order* adopted denying the reconsideration petitions but making certain clarifications and modifications to the Order.

—AT&T
CC Docket No. 85-26

Common Carrier, Data Processing Service

Report and Order in the Third Computer Inquiry adopted to implement a revised regulatory framework, and to address specific problems that have arisen under the Second Computer Inquiry.

Supplemental Notice in the Third Computer Inquiry is adopted to consider certain issues on which further comment may be appropriate.

—Third Computer Inquiry
CC Docket No. 85-229

Common Carrier, Specialized Services

(See: Common Carrier, Data Processing Service — *Third Computer Inquiry*)

Community Qualifications

Review Board affirmed ALJ's determination that Fairforest, South Carolina is not a "community" under rule sec. 73.1120(a) and grant of mutually exclusive AM application for community of Morganton, North Carolina.
—Beacon Broadcasting
MM Docket No. 84-1309

Applications for a Class C FM station, in suburban communities contiguous to nearby dominant metropolitan area which have mutual interests and similar characteristics, and which propose to serve the same areas, are entitled to equal consideration under Section 307(b) of the Act. Applicants are to be evaluated on basis of contingent standard comparative issue.
—Debra D. Carrigan
MM Docket No. 83-858

Comparative Criteria

No diversification preference awarded for local weekly newspaper interest because circulation was small and other local newspaper were present. Divestiture pledge, made in integration statement, was timely because application no longer calls for reporting of weekly newspaper interests.
—Barton B/cing Co.
MM Docket No. 84-728

Where the record was not sufficient for an objective judgment that either applicant is preferable to the other under the pertinent comparative factors, the Commission ordered a tie-breaker lottery pursuant to 47 U. S. C. 154(j) and 47 C. F. R. 1.824(a).
—RRAD. Inc.
CC Docket No. 84-1272

Comparative Issue, Contingent

(See: Community Qualifications — *Debra D. Carrigan*)

Computer Regulation

(See: Common Carrier, Data Processing Service — Computer Inquiry)

Conflict of Interest

Review Board denies appeal and affirms ALJ's ruling disqualifying appellant's counsel from further participation in the proceeding. Counsel had simultaneously represented in another ongoing proceeding an applicant having an 18% non-voting stockholder who also was a proposed 70% limited partner in an opponent of counsel's client in the instant proceeding. The interests of the two clients were in sharp conflict, and counsel failed to rebut the presumption that the former client had divulged confidential information which could be used against its best interests in favor of the instant client. Counsel failed to obtain the informed consent of the former client.
—Dorothy J. Owens
MM Docket No. 85-267

Customer Premises Equipment
(See: Common Carrier – *AT&T*)

Declaratory Ruling
Declaratory Ruling adopted conditionally granting the Secretary of Defense's petition regarding the Emergency Preparedness Telecommunications Procedures Manual. The Commission in its decision, believes that the procedures discussed appear reasonable and that carrier actions in response to requests made in accordance with the Procedures Manual are prima facie lawful.
—Telecommunications Procedures

Deregulation
(See: Common Carrier, Data Processing Service — *Third Computer Inquiry*)

Digital Transmission
Memorandum Opinion and Order adopted denying Associated Information Services Corporation's petition for reconsideration of the Commission's Report and Order amending its rules to implement a lottery system. Action taken in part as a result of the Commission's determination that the petitioner merely restates objections to the lottery procedures that were considered in the original proceeding and are therefore not proper subjects for reconsideration.
—Digital Electronic Message Service
CC Docket No. 85-40

Emergency Communications
(See: Declaratory Ruling — *Telecommunications Procedures*)

Employment, Equal Opportunity Rule
Memorandum Opinion and Order adopted denying the National Black Media Coalition's Petition for Reconsideration of the Commission's Memorandum Opinion and Order denying a petition for rulemaking to amend the Broadcast Network Affiliation Rules and Employment Practice Rules. The Commission feels that any action on the merits of the original petitioner's proposal would be premature prior to resolution of the issues raised in a related proceeding (MM Docket 85-350).
—B/c Network Affiliation

Fair Distribution of Broadcast Facilities
(See: Community Qualifications — *Debra D. Carrigan*)

Frequency Equitable Distribution of Under 307(b)
In hearing matter of mutually exclusive applications for authority to operate on Clear Channel frequency 1200 kHz, Review Board reversed ALJ's grant based on a contingent standard comparative issue. The Board pointed out that because the ALJ had treated one of the applicants, Suburbanaire, solely as a Milwaukee applicant (Suburbanaire had proposed dual city licensing serving West Allis and Wisconsin), he had committed reversible error in reaching the corollary conclusion that neither applicant (the other proposed

Chicago as its city of license) was entitled to a 307(b) preference. The West-Allis-Milwaukee applicant was awarded a 307(b) preference for proposing to provide a first nighttime transmission service to West Allis.
—*Suburbanaire, Inc.*
MM Docket No. 84-418

Integration of Management and Ownership
Review Board remands proceeding to determine whether non-integrated limited partner husband possesses sufficient passivity to attribute full integration credit to integrated general partner wife.
—*Chester Associates*
MM Docket No. 84-525

Interlocutory Ruling Appeal From
(See: Conflict of Interest — *Dorothy J. Owens*)

License, Revocation
Applicant directed to show to cause why licenses of radio stations WMJM and WFAV-FM should not be revoked as a result of alleged abuse of distress sale processes. Notice of Apparent Liability for forfeiture for violation of Section 310(d) of Communications Act of 1934, as amended.
—*Silver Star Communications*

Multipoint Distribution Service — *Comparative Criteria*)

Orders to Show Cause
(See: License, Revocation — *Silver Star Communications*)

Partnership Agreement
(See: Integration of Management and Ownership — *Chester Associates*)

Petition Dismissed
Petition to simplify the current licensing procedures for end users of SMR systems dismissed pursuant to authority contained in Sec. 1.407 of rules. Report and Order in PR Docket 85-302 provides much of the relief requested by petitioners as it eliminates many of the occasions when SMR end users have to file modification applications.
—Specilaized Mobile Radio

Private Land Mobile Radio Service
(See: Petition Dismissed — *Specialized Mobile Radio*)

Private Line Service
Petitions for reconsideration of the Commission's action on May 28, 1985 permitting AT&T's restructured private line tariffs to take effect are denied.
—*AT&T Communications*
CC Docket No. 85-400

Program Origination

Upon a proper showing, waiver of Section 73.1130 of the Commission's Rules may be appropriate to permit a television licensee to exclude films and syndicated programs from the main studio program origination requirements.
—Pappas Telecasting of Carolinas

Reconsideration

(Private Line Service — *AT&T Communications*

Reconsideration, Petition for, Denial of

(See: Amateur Operator, Examination-*Amateur Operator Examinations*)

(See also: Authority Delegated, Action on — *AT&T*)

See also: Employment, Equal Opportunity Rule — *B/c Network Affiliation*)

(See also: Digital Transmission — *Digital Electronic Message Service*)

(See also: Employment, Equal Opportunity Rule — *B/c Network Affiliation*)

Rules, Amendment of

Order adopted amending Parts 1 and 73 of the Commission's rules to allow the publication of summaries of hearing designation orders in the Federal Register in lieu of full texts. Action taken in light of budgetary constraints.
—Amendment of Parts 1 and 73

Rules, Waiver of, Denied

Memorandum Opinion and Order adopted denying Wood River Public Broadcasting Corporation's request for waiver and retaining its application for a construction permit for a new FM station to serve Sun Valley, Idaho. The Commission feels that Wood River's argument for a spacing waiver is not directed toward service to Sun Valley nor has it satisfied the threshold test for a spacing waiver.
—Donovan Burke

Short Spacing

(See: Rules, Waiver of, Denied — *Donovan Burke*)

Suburban Area

Applications for a Class C FM Station, in contiguous communities which are part of the same urbanized area and have mutual interests and similar characteristics, which propose to serve the same areas are entitled to equal consideration under Section 307(b) of the Act.
—Owners, Inc.
BC Docket No. 82-570

(See: Community Qualifications — *Debra D. Carrigan*)

Tariff, Regulation of
(See: Common Carrier, Data Processing Service — *Third Computer Inquiry*)

Television, Low Power
(See: Application, Defective — *Tampa Broadcasting Corp.*)

operator examination session. The [illegible] League, Incorporated (the ARRL), filed [illegible] Reconsideration. David E. Popkin also filed a Petition for Reconsideration.

2. The ARRL's petition sought reinstatement of a mandatory waiting period and recommended one of 27 days. The ARRL's first contention is that deletion of Section 97.26(i) increases administrative burdens for Volunteer-Examiner Coordinators (VEC's) because it requires the preparation of more than one version of each examination. This [illegible] any existing 30-day period, VEC's [illegible] same question set. However, [illegible] the *Report and Order, supra,* "VEC's [illegible] to use the same set of questions in successive [illegible]." This is to insure that a person being reexamined receives a different question set than the set recently failed. It is also one of the primary tools to assure the integrity of both volunteer examination systems by [illegible] spread of advance information (*e.g.,* Friday examinees telling Saturday examinees the questions on the examination). Therefore, while barring *an individual* from re-taking an examination for a given period can assure that *that individual* will not be given the same question set on re-examination, this approach would still leave open [illegible] spread of advance information.

3. There are several ways to assure that individuals are not given the same set of questions upon reexamination. One would be for the VEC to require a waiting period keyed to its ability to provide a different set of questions. (Popkin's petition sought clarification on this point.) As part of its examination coordination function, each VEC is now free to adopt any reasonable waiting period, including the twenty-seven day period desired by the ARRL. [illegible] other approaches.

4. A VEC could also choose to use different sets of questions at exam sessions or keep records to assure that any individual [illegible]

Amateur Operator Examination
Reconsideration, Petition for, Denial of

Memorandum Opinion and Order adopted denying the petitions for partial reconsideration filed by the American Radio Relay League and David B. Popkin concerning the Report and Order, *50* FR *38816*. Sept. 25, 1985, removing the waiting period of thirty days before an amateur operator applicant could retake an exam. The Commission feels that it has responded adequately to the petitioners' concerns by revising the PR Bulletin 1035A and that the rule removal does not diminish the integrity of the novice examination system.
—*Amateur Operator Examinations*
PR Docket No. 85-21

FCC 86-242

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Section 97.26 of the Commission's Rules to Remove Unnecessary Regulations Concerning Amateur Operator Examinations Administered by Volunteers.	PR Docket No. 85-21 RM-4835

MEMORANDUM OPINION AND ORDER

Adopted: May 9, 1986; Released: May 15, 1986

BY THE COMMISSION:

1. By *Report and Order* in this proceeding, 50 FR 38816, September 25, 1985, we deleted 47 CFR § 97.26(h) This rule had been established when the Commission still administered amateur operator examinations. It specified a waiting period of thirty days before an applicant for an amateur operator license could retake the same or a higher examination element once that element had been failed. We also modified 47 CFR § 97.26(a), regarding public announcement of and the number of candidates in an amateur

operator examination session. The American Radio Relay League, Incorporated (the ARRL), filed a Petition for Partial Reconsideration. David B. Popkin also filed a Petition for Reconsideration.

2. The ARRL's petition sought reinstatement of a mandatory waiting period and recommended one of 27 days. The ARRL's first contention is that deletion of Section 97.26(h) increases administrative burdens for Volunteer-Examiner Coordinators (VEC's) because it requires the preparation of more than one version of each examination. This argument presumes that during any given 30-day period VEC's continuously re-use the same question set. However, as we stated at paragraph seven of the *Report and Order, supra*, "VEC's have been instructed not to use the same set of questions in successive examination sessions." This is to insure that a person being reexamined receives a different question set than the set recently failed. It is also one of the primary tools to assure the integrity of both volunteer examination systems by preventing the spread of advance information (*e.g.*, Friday examinees telling Saturday examinees the questions on the examination). Therefore, while barring *an individual* from re-taking an examination for a given period can assure that *that individual* will not be given the same question set on re-examination, this approach would still leave open the possible spread of advance information.

3. There are several ways to assure that individuals are not given the same set of questions upon reexamination. One would be for the VEC to require a waiting period keyed to its ability to provide a different set of questions. (Popkin's petition sought clarification on this point.) As part of its examination coordination function, each VEC is now free to adopt any reasonable waiting period, including the twenty-seven day period desired by the ARRL. This way avoids any burden associated with other approaches.

4. A VEC could also choose to use different sets of questions at every session, or keep records to assure that any individual retaking an examination within a short time would be given a different set of questions. Another alternative would be to employ multiple sets of questions for each element at each examination session. There are sufficient questions in the pools for 10 completely different examinations without even re-using a single question. In view of the many ways in which different VEC's can elect to safeguard the examination process, we will not limit their

flexibility by requiring them to use only one.

5. While a Commission-mandated thirty day waiting period may have had the corollary effect of promoting examination integrity and conscientious study, its intended purpose was to conserve Commission resources when the Commission still administered the examinations. We now rely upon VEC's to coordinate volunteer examiners, as requested by the ARRL in PR Docket No. 83-27. We accept the voluntary services of VEC's to coordinate amateur examinations for the benefit of amateurs and the general public. Section 97.26(h) is no longer necessary to conserve Commission resources. We will not retain it merely to accommodate the administrative choices made by one or more VEC's. It is far more important to eliminate unnecessary and outdated government regulation.

6. We now turn to the ARRL's second contention regarding the Novice examination system. Both the ARRL and Popkin argued that elimination of the mandatory thirty-day waiting period could have an adverse effect on administration of Novice examinations. The integrity of the Novice examination system rests not with 47 CFR § 97.26(h), but with our reliance on the volunteer examiners (VE's). As we stated in PR Docket No. 82-727, in which we adopted the current Novice volunteer examination system:

> . . . we affirm our belief in the fundamental integrity of amateur licensees. They are, as a group, dedicated to the ideals, principles, and goals of amateur radio and will not sully their ranks by welcoming into it persons who do not meet the qualifications and high standards that are required of an amateur operator. *Report and Order*, 48 FR 32586, July 18, 1983.

Nevertheless, in response to these petitioners' concerns we have revised PR Bulletin 1035A, *Questions for the Element 2 Amateur Radio Operator Examination*, to remind VE's that neither the same set of questions nor the same telegraphy message may be used when re-administering the Novice examination to the same person. We believe this is sufficient and we conclude that deletion of 47 CFR § 97.26(h) does not diminish the integrity of the Novice examination system.

7. Popkin asserted that by adopting a new sentence in 47 CFR § 97.26(a), allowing an examiner to limit the number of candidates at an examination session, we have made a substantive change in the rules without required notice and comment. To the contrary, we proposed a rule change to this section regarding the same general subject, *i.e.*, public announcement of examinations and restrictions on the number of candidates. After analysis of the comments, we adopted rules different than those proposed but

clearly related to the subjects raised by the *Notice of Proposed Rule Making* and discussed in the comments.

8. Popkin also stated that new Section 97.26(a) would permit discrimination by enabling examiners to arbitrarily refuse an applicant by claiming that a previously unstated limit on the number of candidates had just been reached. To the contrary, we made it clear in the *Report and Order, supra*, at paragraph 10, that any limitation on the number of candidates for an examination must be predetermined and stated in the public announcement.

9. ACCORDINGLY, IT IS ORDERED that the Petition for Partial Reconsideration filed by the American Radio Relay League, Incorporated, IS DENIED.

10. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by David B. Popkin IS DENIED.

11. These actions are taken pursuant to Section 1.429 of the Commission's rules (47 CFR § 1.429) and Sections 4(i) and 303(r) of the Communications Act of 1934, as amended (47 U. S. C. §§ 154(i) and 303(r.)

12. IT IS FURTHER ORDERED that this proceeding is terminated.

13. For further information about this document contact John J. Borkowski, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Rules, Amendment of

Order adopted amending Parts 1 and 73 of the Commission's rules to allow the publication of summaries of hearing designation orders in the Federal Register in lieu of full texts. Action taken in light of budgetary constraints. —*Amendment of Parts 1 and 73*

FCC 86-241

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Amendment to Sections 1.221(b),
1.223(b), 1.223(c), 1.229(b),
73.3522(b)(2), 73.3594(d)(4),
and 73.3594(f)(4) of the
Commission's Rules

ORDER

Adopted: May 7, 1986; Released: May 20, 1986

BY THE COMMISSION:

1. By this *Order* the Commission decides that, commencing immediately, it will amend its rules to allow it to publish summaries of orders designating applications for hearing in the *Federal Register*. Current Commission rules generally contemplate *Federal Register* publication of the full text of hearing designation orders.[1] However, due to budgetary constraints and the rising cost of *Federal Register* publication, the Commission has concluded that the publication of summaries of hearing designation orders will be a reasonable and cost-efficient method of apprising potential intervenors of issues that might be of concern to them. The summaries will consist of a summary of the explanatory text of the hearing designation order and the full text of the issues

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[1] We note, however, that since 1983 the FM Branch, Audio Services Division, Mass Media Bureau, has published hearing designation order abstracts and not their full texts.

designated for hearing on an application. For mass media services, the summaries will be an abstract of the hearing designation order, and include the names of the parties and list the hearing issues. The list of hearing issues will be keyed to the definitions set forth in the Appendix to this *Order*. The published summaries will additionally advise how copies of the complete hearing designation order may be obtained.[2]

2. Section 309(e) of the Communications Act provides:

> When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register.

47 U.S.C. § 309(e). Specifically, the legislative history of section 309(e) indicates that Congress sought to balance the intervenor's right to protect his interests and participate in the hearing against the Commission's interest in expediting formal hearings. To effect this balance, Congress decided that the intervenor's filing period would run from the date of publication of the hearing issues, rather than the day set for commencement of the hearing. *See* H.R. Rep. No. 1351, 88th Cong., 2nd Sess. 5 (1964). *Federal Register* publication was designed to afford a potential intervenor sufficient notice "to protect his . . . interest." *Id.* 2; *see also id.* at 5 (FCC report on H.R. 5327).

3. In view of this, the Commission has determined that publication of summaries of hearing designation orders with either the full text of the hearing issues or, for the mass media services, a list of the hearing issues keyed to a definitional Appendix, will give notice of the issues designated on an application and satisfy the statutory purpose of section 309(e). Therefore, the Commission is amending section 1.221(b) of the rules, 47 C.F.R. § 1.221(b), which calls for *Federal Register* publication of full hearing designation orders, to authorize it also to publish a summary of the hearing designation order. The Commission is also amending sections 1.223(b), 1.223(c), and 1.229(b) of the rules, 47 C.F.R.

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[2] The full text of hearing designation orders are available on the date of release from the Office of Congressional and Public Affairs. Thereafter, the full texts will be available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, Northwest, Washington, D.C., or as otherwise specified in the summary published in the *Federal Register*. The complete texts may also be purchased from the Commission's duplicating contractor, International Transcription Service, (202) 857-3800, 2100 M Street, Northwest, Suite 140, Washington, D.C. 20037.

§§ 1.223(b), 1.223(c), and 1.229(b), with clarifying language explicitly authorizing *Federal Register* publication of the complete hearing designation order or a summary thereof. For mass media services, a hearing designation order summary will include a list of hearing issues which will be keyed to the definitions set forth in the Appendix to this *Order*. Both this *Order* and the Appendix will be published together in the *Federal Register*.

4. Prior notice and public comment procedures are not required because this action is interpretive and procedural in nature. *See* 5 U.S.C. § 553(b)(3)(B), 47 C.F.R. §§ 1.412(b)(3) and (5).

5. ACCORDINGLY, IT IS ORDERED, pursuant to authority provided by sections 4(i), 4(j), and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), and 303(r), that the Commission's Rules ARE AMENDED as shown at the end of this document.

6. IT IS FURTHER ORDERED that this *Order* is effective upon publication in the *Federal Register*. *See* 5 U.S.C. § 553(d)(2), 47 C.F.R. § 1.427(b).

* * * *

List of Subjects

47 CFR Part I

Administrative practice and procedure. Federal Communications Commission.

Part I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read:

47 U.S.C. 154, 303.

2. In § 1.221, paragraph (b) is revised to read as follows.

§ 1.221 Notice of hearing; appearances.

* * * * *

(b) The order designating an application for hearing is mailed to the applicant by the Secretary of the Commission and this order or a summary thereof is published in the FEDERAL REGISTER. Reasonable notice of hearing will be given to the parties in all proceedings; and, whenever possible, the Commission will give at least 60 days notice of comparative hearings.

* * * * *

3. In § 1.223, paragraphs (b) and (c) are revised to read as follows:

§ 1.223 Petitions to intervene.

* * * * *

(b) Any other person desiring to participate as a party in any hearing may file a petition for leave to intervene not later than 30 days after the publication in the FEDERAL REGISTER of the full text or a summary of the order designating an application for hearing or any substantial amendment thereto. The petition must set forth the interest of petitioner in the proceedings, must show how such petitioner's participation will assist the Commission in the determination of the issues in question, must set forth any proposed issues in addition to those already designated for hearing, and must be accompanied by the affidavit of a person with knowledge as to the facts set forth in the petition. The presiding officer, in his discretion, may grant or deny such petition or may permit intervention by such persons limited to a particular stage of the proceeding.

(c) Any person desiring to file a petition for leave to intervene later than 30 days after the publication in the FEDERAL REGISTER of the full text or a summary of the order designating an application for hearing or any substantial amendment thereto shall set forth the interest of petitioner in the proceeding, show how such petitioner's participation will assist the Commission in the determination of the issues in question, must set forth any proposed issues in addition to those already designated for hearing, and must set forth reasons why it was not possible to file a petition within the time prescribed by paragraphs (a) and (b) of this section. Such petition shall be accompanied by the affidavit of a person with knowledge of the facts set forth in the petition, and where petitioner claims that a grant of the application would prescribed in paragraph (a) of the section. If, in the opinion of the presiding officer, good cause is shown for the delay in filing, he may in his discretion grant such petition or may permit intervention limited to particular issues or to a particular stage of the proceeding.

* * * * *

4. In § 1.229, paragraph (b) is revised to read as follows:

§ 1.229 Motions to enlarge, change, or delete issues.

* * * * *

(b) Such motions must be filed within 15 days after the full text or a summary of the order designating an application for hearing has been published in the FEDERAL REGISTER. In comparative broadcast proceedings (including comparative renewal proceedings), however, such motions shall be filed within 30 days after the full text or a summary of the designation order has been published in the FEDERAL REGISTER. Any person desiring to file a motion to modify the issues after expiration of the above specified periods shall set forth the reason why it was not possible to file the motion within the prescribed period. Except as provided in paragraph (c) of this section, the motion will be granted only if good cause is shown for the delay in filing. Motions for modification of issues which are based on new facts or newly discovered facts shall be filed within 15 days after such facts are discovered by the moving party.

* * * * *

5. In § 73.3522, paragraph (b)(2) is revised to read as follows:

§ 73.3522 Amendment of applications

* * * * *

(b) Postdesignation amendment

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(2) In comparative broadcast cases (including comparative renewal proceedings), amendments relating to issues first raised in the designation order may be filed as a matter of right within 30 days after that Order or a summary thereof is published in the FEDERAL REGISTER, or by a date certain to be specified in the Order.

6. In § 73.3594, paragraphs (d)(4) and (f)(4) are revised to read as follows:

§ 73.3594 Local public notice of designation for hearing

* * * * *

(d)(4) The issues in the hearing as listed in the FCC's order or summary of designation for hearing.

(f)(4) The issues in the hearing as listed in the FCC's order or summary of designation for hearing.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

ISSUES

City Coverage — AM	**To determine whether the proposal of the applicant(s) would provide coverage of the city sought to be served, as required by Section 73.24(j) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.**
City Coverage — FM	**To determine whether the proposal of the applicant(s) would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.**
City Coverage — TV	**To determine whether the proposal of the applicant(s) would provide coverage of the city sought to be served, as required by Section 73.685(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.**
Rule 73.685	**To determine, with respect to the applicant(s), whether circumstances exist to warrant a waiver of Section 73.685(____) of the Commission's Rules.**
Minimum Separations	**To determine, with respect to the applicant(s), whether circumstances exist to warrant a waiver of Section 73.610 of the Commission's Rules.**
Air Hazard	**To determine, with respect to the applicant(s), whether there is a reasonable possibility that the tower height and location proposed would constitute a hazard to air navigation.**
Main Studio	**To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of the main studio outside the community of license by the applicant(s).**
Site Availability	**To determine whether the applicant(s) has reasonable assurance that the transmitter site specified will be available to it.**

Environmental Impact	If a final environmental impact statement is issued with respect to the applicant(s), in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301–1319 of the Commission's Rules.
Multiple Ownership	To determine, with respect to the applicant(s), whether the common ownership, operation and control of [station/newspaper] and the proposed station is consistent with Section 73.3555 of the Commission's Rules and, if not, whether a grant of the application would be in the public interest.
Cross-interest	To determine, with respect to the applicant(s), whether the involvement of [named individual] with [station/newspaper] is consistent with the Commission's cross-interest policy and, if not, whether a grant of the application would be in the public interest.
Satellite	To determine, with respect to the applicant(s), whether circumstances exist which would make the proposed television operation as a "satellite" or "primarily a satellite" necessary for the community.
Alien Control	To determine whether the applicant/licensee is controlled by aliens or their representatives in violation of Section 310(b) of the Communications Act of 1934, as amended.
Misrepresentation	To determine whether the applicant/licensee made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission or attempted to deceive or mislead the Commission.
Qualifications	To determine, in light of the evidence, adduced pursuant to the issues specified, whether the applicant(s) is qualified to construct and operate the requested facilities as proposed.
Financial Qualifications	To determine with respect to the following applicant(s) whether, in light of the evidence adduced concerning the deficiency set forth above in this Order, the applicant(s) is financially qualified.
307(b)	To determine: (a) the areas and populations which would receive primary aural service from the proposals and the availability of other primary service to such areas and populations; and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

307(b) — Modification	To determine: (a) the areas and populations which would receive primary aural service from the proposal(s) of the applicant(s) for new facilities and the availability of other primary service to such areas and populations; (b) the areas and populations which would gain or lose primary aural service from the proposal(s) of the applicant(s) for modifications of existing facilities and the availability of other primary service to such areas and populations; and (c) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals (or combination of proposals) would best provide a fair, efficient and equitable distribution of radio service.
307(b) — Noncommercial Educational	To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
Comparative	To determine which of the proposals would, on a comparative basis, [better/best] serve the public interest.
Comparative — Noncommercial Educational TV	To determine: (a) the extent to which each applicant's proposed operation will be integrated into the overall cultural and educational objectives of the respective applicants; (b) the manner in which each applicant's proposed operation meets the needs of the community to be served; and (c) whether the factors in the record demonstrate that one applicant will provide a superior noncommercial educational broadcast service.
Comparative — Noncommercial Educational FM	To determine: (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and, if so, the terms and conditions thereof; (b) the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.
Contingent Comparative	To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the

	proposals would, on a comparative basis, best serve the public interest.
Contingent Comparative — Noncommercial Educational FM	**To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.**

Authority Delegated, Action On
Reconsideration, Petition for Denial of

> *Memorandum Opinion and Order* adopted denying AT&T's petition for reconsideration of the Commission's Memorandum Opinion and Order (FCC 85-197) regarding the delegation of authority to the Chief, Common Carrier Bureau. AT&T also sought to limit the previous Order's applicability to non-proprietary information. The Commission feels that the delegation of authority was properly adopted.
> —*AT&T*

FCC 86-158

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Amendment of Part O of the
Commission's Rules with Respect to
Delegation of Authority to the Chief,
Common Carrier Bureau

MEMORANDUM OPINION AND ORDER

Adopted: April 7, 1986; Released: April 11, 1986

BY THE COMMISSION:

I. INTRODUCTION AND BACKGROUND

1. We have before us a Petition for Reconsideration (Petition) filed by the American Telephone & Telegraph Company (AT&T) requesting us to reconsider the *Memorandum Opinion and Order*, FCC 85-197 (released April 24, 1985) (*Order*) in the above-captioned proceeding and to limit its applicability to non-proprietary information pending further proceedings on the appropriate procedures to be followed with respect to proprietary information.[1]

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[1] We invited public comment on AT&T's Petition for Reconsideration, *FCC Public Notice* dated June 28, 1985. Six formal comments were received from the Idaho Public Utilities Commission (Idaho PUC), the Minnesota Public

2. In the *Order*, this Commission, on its own motion, pursuant to Sections 4(i), 4(j), and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. Secs. 154(i), 154(j), and Sec. 155(c), amended Section 0.291(b) of the Commission's rules delegating certain authority to the Chief, Common Carrier Bureau. Section 0.291, paragraph (b), as revised, appears as follows:

> (b) *Authority concerning sections 219 and 220 of the Act.* The Chief, Common Carrier Bureau shall not have authority to promulgate regulations or orders pursuant to section 219 or section 220 of the Communications Act of 1934, as amended, except that the Chief, Common Carrier Bureau shall have authority to (1) approve depreciation charges to operating expenses on an interim basis subject to commission prescription prior to the end of January of the year following that in which interim approval is given; *and,* (2) *approve the release to state public utility commissions such information as the Bureau may obtain during the course of its audit activities which falls within the common interest and jurisdiction of the Commission and the states.*[2]

3. Pursuant to this Commission's rules, the Common Carrier Bureau performs certain specific functions, including the administration of accounting and reporting requirements and the conduct and coordination of compliance and enforcement activities. 47 C.F.R. Sec. 0.91(a). In many instances, these functions duplicate those performed at the state level. For example, the Bureau has conducted audits of the same carrier materials which would be examined by the states in the context of a rate case. Therefore, it is in this Commission's and the states' mutual interests to avoid duplication of activities wherever possible, thereby more effectively utilizing our limited resources. In particular, the Common Carrier Bureau's Accounting and Audits Division would benefit if joint, cooperative activities with the states were authorized. Accordingly, we concluded that in view of the concurrent, complementary nature of the federal and state telecommunications regulations and policies, fiscal and regulatory efficiencies

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Utilities Commission (Minnesota PUC), Southwestern Bell Telephone Company (Southwestern Bell), BellSouth Corporation (BellSouth), the Bell Atlantic Telephone Companies (Bell Atlantic) and the NYNEX Telephone Companies (NYNEX). AT&T filed its Reply on August 12, 1985. The National Association of Regulatory Utility Commissioners (NARUC) filed an informal comment in support of the *Order*. Letter from the President, NARUC, to the Commission's Chairman, dated June 7, 1985.

[2] The underlined text is that which the *Order* added.

could be achieved if joint audits and sharing of audit findings are permitted.

4. AT&T supports our efforts to achieve regulatory efficiencies through greater cooperation with state public utilities commissions. As such, it does not object to the conduct of Federal/State joint audits.[3] However, AT&T challenges the *Order* on two separate grounds. First, it alleges that the *Order* was adopted without first providing the affected parties with notice or an opportunity to comment and that the procedure was therefore improper. Furthermore, AT&T asserts that the Federal Trade Secrets Act prohibits trade secrets and confidential information from being released by a federal agency unless authorized by law.[4] Finally, AT&T raises concern about the states' adequacy and ability to protect proprietary information. For the reasons stated herein, we deny AT&T's Petition.

II. DISCUSSION

5. We first address AT&T's charge that the *Order* was procedurally defective. The Administrative Procedure Act (APA), 5 U.S.C. Sec. 551(4) and (5), defines "rule making" to mean "agency process for formulating, amending, or repealing a rule." Section 553 prescribes procedural requirements for these processes. Under this rule, agency rulemaking must generally be accompanied by: (1) advance publication in the Federal Register of the proposed rule or its substance; (2) opportunity for public participation through submission of written comments, with or without oral presentation; and (3) publication of the final rule, incorporating a concise statement of its basis and purpose, thirty days before its effective date. However, Sec. 553(b)(A) provides an important exception to this requirement. It states that the notice-and-comment procedure does not apply if the rule in question is a rule of "agency organization, procedure, or practice." The rationale behind this exception is that such rules do not carry the force of law. Rather, they merely express an agency's internal practice or procedure. In *Batterton* v. *Marshall*, 648 F.2d 694 (D.C. Cir. 1984), the court interpreted "internal house-keeping measures organizing agency activities" to mean non-binding action which merely expresses an agency's internal practice or procedure. The court further held that such actions are not

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[3] *See* Petition at 2. This view is shared by NYNEX, BellSouth, BellAtlantic and Southwestern Bell in their respective comments filed with the Commission. NARUC also strongly endorses the concept.

[4] *Id.* at 6 and 7.

determinative on issues or rights, although they *may* alter the manner in which the parties present themselves or their viewpoints to the agency. *Id.* at 702.[5]

6. In the instant case, the procedural issue in question pertains to a delegation of authority from this Commission to the Chief, Common Carrier Bureau to disclose information garnered during a joint or cooperative audit between Federal and state auditors, as well as this Commission's audit findings. Since by statute the Commission already has explicit authority to make such disclosures, where appropriate (*see* 47 U.S.C. Secs. 220(c) and 410(b)), the delegation accomplishes no substantive change in the exercise of Commission authority. Thus, whether disclosure is made by the Commission or Bureau Chief, the substantive impact on carriers who submit the information is no different than under existing law. In order to facilitate and expedite the decisional process itself, we issued the *Order* delegating the responsibility to the Bureau Chief. As such, the contemplated delegation conforms to a change in our "internal housekeeping rule" which, by virtue of Sec. 553(b)(3)(A) of the APA, is exempted from the notice-and-comment requirements of Sec. 551. For this reason, we affirm that the *Order* confers a mere delegation and is therefore procedurally sound.[6]

7. AT&T also alleges that the Federal Trade Secrets Act, 18 U.S.C. Sec. 1905, prohibits trade secrets and confidential information from being released by a federal agency unless authorized by law. Even assuming that disclosure to other bodies of government is barred by the Trade Secrets Act, we cannot foresee whether the information uncovered during a joint audit or information submit-

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[5] *See also* Guardian Federal Savings and Loan Association v. Federal Savings and Loan Insurance Corporation, 589 F.2d 658, 655 (D.C. Cir. 1978). In that case, the court ruled that an internal agency practice or procedure is one that is primarily directed toward improving the efficient and effective operations of an agency, and not toward a determination of the rights or interests of affected parties.

[6] In the *Order*, we stated that "Commission participation in joint and cooperative activities engaged in pursuant to this order is conditional upon a requirement that state participants are willing and able to treat commercial information according to our confidentiality rules and guidelines." We also stated that "To the extent that the FOIA imposes a higher standard of confidentiality than a particular state law, our action today will require all participants to adhere to the higher federal standard." *Order* at para. 10 and note 6. AT&T maintains that our statements conflict with existing Commission rules regarding release of proprietary information. We do not believe that such a conflict exists. Our rules simply provide that proprietary information will not be routinely disclosed. 47 C.F.R. Sec. 0.457. We did not intend to modify or add to the disclosure procedures, and any changes to those procedures will be made only after completion of a rulemaking proceeding.

ted by the carriers in response to an audit will fall within the ambit of Exemption 4 of the FOIA. If it does not, then the FOIA itself may constitute the requisite "authorization by law" for disclosure specified in the Trade Secrets Acts. *See Chrysler Corporation* v. *Brown*, 441 U.S. 301 (1979). In addition, as noted in the *Order* at paragraphs 7 and 8, Section 220(f) of the Communications Act authorizes FCC employees, upon direction by the Commission, to disclose information gathered while examining a carrier's books or accounts. *See also* 47 U.S.C. 410(b). This is precisely the type of congressional authorization to disclose information which exempts disclosure from the strictures of the Trade Secrets Act. *See Chrysler Corporation* v. *Brown*, *supra*. Since, as noted above, our *Order* merely delegated this preexisting Commission authority to the Bureau Chief, disclosures directed by the Bureau Chief would also be authorized by law. In addition, the Commission's rule authorizing discretionary disclosure of trade secrets and confidential information, 47 C.F.R. Sec. 0.457(d)(1), is grounded in a congressional grant of legislative authority pursuant to Section 4(j) of the Communications Act, 47 U.S.C. Sec. 154(j), *see FCC* v. *Schreiber*, 381 U.S. 279 (1965), that passes muster under the *Chrysler* test. *See Northern Television, Inc.* v. *FCC*, No. 79-3468 (D.D.C. April 18, 1980).

8. Next, AT&T asks the Commission to limit the applicability of the *Order* to non-proprietary information until a set of procedures, consistent with Secs. 0.457(d) and 0.459 of the Commission's rules, 47 C.F.R. Secs. 0.457(d) and 0.459, are adopted to protect proprietary information released to state commissions.[7] Specifically, AT&T requests us to address the following issues: (1) What constitutes the ability to protect adequately proprietary information; (2) What procedures should be followed in determining a state commission's ability to protect proprietary information; (3) Which state commissions are currently able to meet the FCC's confidentiality rules and guidelines; (4) What obligation should be imposed upon the state commissions to notify the FCC and the carriers of actual or contemplated changes in state laws relating to proprietary information; (5) What procedures should and can be adopted to require state commissions to return records to the FCC upon changes to state laws affecting their ability to meet the FCC's confidentiality rules and guidelines; (6) What notice should be given to carriers prior to the release of proprietary information to a state commission;

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[7] Four commentors, NYNEX, BellSouth, BellAtlantic, and Southwestern Bell, support this argument in principle.

(7) What procedures should be implemented to allow a carrier to challenge the release of information to a state commission.[8]

9. In this part of its petition, AT&T asks us to set new rules governing the interrelationship between the Commission and the state PUCs in the context of releasing confidential financial information. Although we agree that our rules do not now set forth special procedures for the release of proprietary information to the states, they do afford carriers notice and an opportunity to contest any contemplated disclosure of documents that may require confidential treatment. To the extent that AT&T has raised issues which merit our consideration, and believes that special provisions in our rules are required to address these issues, AT&T must file a petition for rulemaking conforming to the requirements of Sections 1.49, 1.52 and 1.419(b) (or Sec. 1.420(e), if applicable) of our rules. The petition should set forth the text or substance of the proposed rule, together with all the facts, views, arguments and data deemed to support the action requested, and should indicate how the interests of AT&T and other carriers will be affected.

CONCLUSION

10. We conclude that AT&T's Petition for Reconsideration must be denied since the delegation of authority to the Chief, Common Carrier Bureau was properly adopted. Should AT&T desire to pursue its concerns regarding disclosure of proprietary material, it may file a Petition for Rulemaking consistent with the above Commission rules.

ORDERING CLAUSE

11. Accordingly, IT IS ORDERED That, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 405, AT&T's Petition for Reconsideration herein IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[8] Petition at 8.

Common Carrier
Customer Premises Equipment

Memorandum Opinion and Order for Reconsideration of the *AT&T Structural Relief Order* adopted denying the reconsideration petitions but making certain clarifications and modifications to the Order.
—*AT&T*
CC Docket No. 85-26

FCC 86-341

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Company	CC Docket 85-26

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: July 31, 1986; Released: August 7, 1986

BY THE COMMISSION: COMMISSIONER DENNIS NOT PARTICIPATING.

I. Introduction

1. Eight petitions have been filed requesting that we reconsider various aspects of our decision in the *AT&T Structural Relief Order*[1] to permit the American Telephone and Telegraph Company ("AT&T") to provide customer premises equipment ("CPE") free of the structural separation requirements we established in the *Second Computer Inquiry*.[2] In the *AT&T Structural*

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[1] Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Co., *Order*, CC Docket No. 85-26, 102 FCC 2d 655 (1985). *See also* 47 C.F.R. § 64.702.

[2] Second Computer Inquiry, *Final Decision*, 77 FCC 2d 384, *modified on reconsideration*, 84 FCC 2d 50 (1980), *further modified on reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on*

Relief Order, we concluded that those structural separation requirements should be replaced by nonstructural safeguards that would protect against the discrimination and cost-shifting concerns identified in the *Second Computer Inquiry*. Based on our review of the reconsideration petitions and of the oppositions, replies, and other pleadings filed in response,[3] we now conclude that both our decision to remove structural separation for AT&T's CPE operations and the nonstructural safeguards established in the *AT&T Structural Relief Order* are fundamentally sound and not in need of major revision. We do, however, clarify and modify those nonstructural safeguards in certain respects.[4] First, we require AT&T to disclose to the public technical information about new or changed network services 12 months rather than 6 months prior to the introduction of a service. We also clarify that AT&T should disclose newly discovered information about its operational network services and should disclose information to entities engaged in the leasing of CPE. Second, we clarify that our concerns about potential discrimination in the provision of network services by AT&T include the quality of those services, and we require AT&T to file with us its procedures for ensuring that such quality discrimination does not occur. We also require it to obtain an annual audit to ensure that those procedures are followed. Third, we require AT&T to notify its WATS and private line customers of our rules on customer proprietary network information through a one-time insert in their network services bills. Fourth, if AT&T provides joint installation and maintenance services for its CPE and transmission circuits, pursuant to the nondiscrimination guidelines of the *AT&T Struc-*

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second further reconsideration, FCC 84-190 (released May 4, 1984).

[3] A list of parties filing pleadings in this proceeding, together with a list of the acronyms and abbreviations used to refer to these parties in this Order, is contained in Appendix A.

CWA's Petition proposes that the Commission take "appropriate action" to protect the status and tenure of AT&T's employees. Because, as CWA acknowledges, its petition does not discuss the substantive portions of the *AT&T Structural Separation Order* and does not request any changes to that Order's conclusions (CWA Petition at 1), we decline to address CWA's proposal, preferring instead to leave the resolution of its concerns to the collective bargaining process.

[4] We note as well that after a detailed review of the nondiscrimination and CPNI plans submitted by AT&T to implement the nonstructural safeguards adopted in the *AT&T Structural Relief Order* and public comments submitted on those plans, the Common Carrier Bureau is requiring AT&T to implement certain modifications to those plans. *See AT&T Plans Order*, CC Docket No. 85-26, mimeo no. 5503 (released July 3, 1986).

tural Relief Order, we require AT&T to coordinate that service with independent CPE vendors.

II. Background

2. In the *Second Computer Inquiry*, we concluded that CPE and enhanced services offerings of AT&T and other telecommunications carriers should be subject only to the minimum regulatory safeguards necessary to ensure the proper functioning of those markets. We further concluded that AT&T's participation in unregulated CPE markets could provide it with opportunities to shift costs improperly from its unregulated to its regulated operations and to engage in discrimination to benefit its sales of CPE. Therefore, we required AT&T to form a separate subsidiary for its provision of CPE to reduce its ability to engage in anticompetitive conduct and to aid state and federal regulators in the detection of any anticompetitive conduct that might occur.[5]

3. In 1982, two years after our decision to impose structural separation on AT&T's offerings of CPE, the United States District Court for the District of Columbia adopted, with certain modifications, a consent decree (Modification of Final Judgment or *MFJ*) settling an antitrust suit brought by the Department of Justice (DOJ) against AT&T.[6] The *MFJ* required AT&T to divest itself of most of the assets of the Bell Operating Companies (BOCs), established certain restrictions on the business activities of the divested BOCs, and freed AT&T from the restrictions of another antitrust consent decree it had entered in 1956 to settle an earlier suit brought by DOJ.[7]

4. Shortly after divestiture, AT&T filed a petition with this Commission asking to be permitted to provide CPE free of the structural separation requirements established in the *Second Computer Inquiry*.[8] In response to that petition, we instituted this rulemaking proceeding,[9] which culminated in the *AT&T*

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[5] For more background on our decision to impose structural separation on AT&T, and on the specific requirements imposed on AT&T, see *AT&T Structural Relief Order*, 102 FCC 2d at 657–65, paras. 3–16.

[6] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[7] *United States v. Western Electric Co.*, 1956 Trade Cases, para. 71,134 (D.N.J. 1956).

[8] AT&T Petition for Relief from Structural Separation Requirements, filed April 30, 1984, File No. ENF 84-17.

[9] American Telephone and Telegraph Co., Petition for Relief from Structural Separation Requirements, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, CC Docket No. 85-26 (ENF 84-17), 50 Fed. Reg. 9060 (March 6, 1985).

Structural Relief Order. In that Order, we recognized that substantial changes had occurred in the telecommunications industry since our decision to impose structural separation on AT&T's offerings of CPE. We noted that the most significant of these changes was the divestiture of the BOCs pursuant to the *MFJ*, which greatly reduced AT&T's assets and revenues from those enjoyed by the predivestiture Bell System and removed from AT&T control of the local exchange facilities owned by the divested BOCs. We also noted the decline of AT&T's market share in the CPE marketplace and the fact that it was faced with growing competition in its regulated offerings of basic, inter-LATA transmission services. Based on these substantial changes in the telecommunications industry, as well as a reassessment of the efficacy of nonstructural safeguards, we found that certain nonstructural safeguards could protect against the potential for anticompetitive conduct presented by the new AT&T at substantially lower costs to AT&T, ratepayers, and consumers than structural separation. We concluded, therefore, that retaining the structural separation requirements for AT&T's provision of CPE was no longer in the public interest and that those requirements should be replaced by a set of nonstructural safeguards to protect against the discrimination and cost-shifting concerns identified in the *Second Computer Inquiry.*[10]

5. In the *AT&T Structural Relief Order*, we imposed four kinds of nonstructural requirements to limit AT&T's potential for anticompetitive conduct in providing CPE on an unseparated basis. We required AT&T: (i) to adhere to a modified version of our existing rules requiring disclosure of technical and other information about changes in the network that affect CPE interconnection; (ii) to refrain from discriminating in favor of its CPE customers in providing network services; (iii) at the customer's request, to disclose its customer proprietary network information (CPNI) to non-AT&T CPE vendors and to withhold such CPNI from AT&T CPE personnel; and (iv) to establish accounting procedures for the proper allocation of joint and common costs between AT&T's regulated network services and unregulated CPE activities.[11] To ensure effective implementation of these safeguards, we also required AT&T to file certain plans describing its implementation of the nondiscrimination, CPNI, and accounting safeguards ("AT&T Plans"). We directed the Common Carrier Bureau (the "Bureau") to undertake an initial review of

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[10] *AT&T Structural Relief Order*, 102 FCC 2d at 679, para. 41.

[11] *Id.* at 682-99, paras. 47-78.

the AT&T Plans before implementation of structural relief to ensure that they addressed the concerns expressed in the *AT&T Structural Relief Order*. We further directed that, after the completion of this initial review, the AT&T Plans would be subjected to a more detailed, post-implementation review with an opportunity for the public to comment.[12]

III. Removal of Structural Separation For AT&T's CPE Operations

A. Positions of Parties

6. In its petition for reconsideration, CCIA argues that AT&T retains some ability to act anticompetitively in its CPE activities given its existing market power as a dominant carrier. In particular, CCIA asserts that AT&T's market power in terrestrial private lines will enable it to undermine competition with respect to data communications CPE. It contends that in the absence of structural separation AT&T could: 1) "lock up" CPE sales before its competitors can make a bid because of its knowledge about its customers' network services plans; 2) subsidize its unregulated CPE operations by improperly shifting costs from those operations to its regulated offerings; 3) benefit its CPE operations by using its knowledge of network changes that will affect CPE interconnection; and 4) discriminate in the installation and maintenance of basic transmission in favor of its own CPE customers. For these reasons, CCIA argues that structural separation should be retained for AT&T's CPE activities.

7. GTE also argues that our decision to remove structural separation for AT&T's provision of CPE is flawed because it constitutes piecemeal restructuring of the industry and prejudges the outcome of the *Third Computer Inquiry* proceeding. Thus, it contends that our decision to remove structural separation only for AT&T's CPE operations places us on a "slippery slope" making the removal of all structural separation requirements seemingly inevitable. It argues that we should be aware, based on our decision in *Dataspeed 40/4*,[13] that the "bright line" we have

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[12] On November 26, 1985, the Bureau initially approved the AT&T Plans and established a pleading cycle to provide interested parties with an opportunity to comment on the Plans. Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Company, *Order*, CC Docket 85-26, Mimeo No. 1143 (released November 27, 1985).

[13] 62 FCC 2d 21 (1977), *aff'd sub nom. IBM v. FCC*, 570 F2d 452 (2d Cir. 1978).

drawn between CPE and enhanced services is not tenable.

B. Discussion

8. We conclude that neither CCIA nor GTE has provided any new arguments or information that require us to alter our conclusion that structural separation requirements should be removed for AT&T's provision of CPE. In the *AT&T Structural Relief Order*, we addressed all the competitive concerns raised by CCIA in its petition. We concluded that, even though these concerns were not completely eliminated by the changes in the communications industry since our decision in the *Second Computer Inquiry*, they were substantially mitigated by recent events, most notably the divestiture of the BOCs from AT&T, and could be adequately addressed through nonstructural means. We found that the divestiture of the BOCs removed from AT&T's control the most significant portion of its monopoly operations with which it could attempt to cross-subsidize its unregulated activities improperly, and made the actual mechanics of cost-shifting much more difficult.[14] We also found that divestiture substantially reduced AT&T's ability to use its market power in basic services to discriminate against its competitors' provision of CPE.[15] Moreover, we found that the extreme competitive vigor of the CPE market greatly reduced our previous concerns that AT&T would be able to displace competition and reestablish a dominant position in the provision of CPE.[16] In light of these changed circumstances, we concluded that nonstructural safeguards would now be able to provide virtually the same level of protection for competition and ratepayers as would structural separation.[17]

9. Furthermore, we also found that structural separation imposed significant costs on society that could be substantially avoided by reliance on nonstructural safeguards, a finding that has remained unchallenged in the reconsideration petitions. We determined that the duplication of facilities and personnel were imposing substantial direct costs on AT&T and on ratepayers. We further found that the indirect costs of structural separation, such as reductions in economies of scope, restrictions on the free flow of information, and inefficiencies in research and development, could be more important in the long run than the directly identifiable costs from duplication. Based on these findings, and

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[14] *AT&T Structural Relief Order*, 102 FCC 2d at 674, paras. 31–32.

[15] *Id.* at 675, paras. 33–34.

[16] *Id.* at 677, para. 36.

[17] *Id.* at 676, para. 35.

on those concerning the relative efficacy of nonstructural safeguards, we concluded that it would serve the public interest to permit AT&T to provide CPE not subject to structural separation, CCIA has failed to persude us otherwise.

10. Neither are we convinced by GTE's arguments. While there may be some similarities in the services provided to end users by CPE and enhanced services, we perceive little difficulty in distinguishing between enhanced services and CPE for purposes of applying structural separation requirements. Indeed, there exist substantial differences in the concerns that must be addressed in considering the removal of structural separation requirements for CPE and enhanced services.[18] For example, CPE providers have for some years been guaranteed "equal access" to the network through the interconnection standards we established in Part 68 of our rules.[19] By contrast, absent structural separation, which places substantial limits on the provision of enhanced services by AT&T and the BOCs, equal access to the network has not been guaranteed for enhanced services. Thus, a major element of our recent *Computer III Order*[20] establishing a regulatory framework to replace structural separation for the enhanced services offerings of both AT&T and the BOCs is the creation of safeguards that ensure all providers of enhanced services efficient and equivalent access to basic services.[21] These differing regulatory concerns fully justify separate treatment of structural separation for CPE and enhanced services.[22]

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[18] GTE's reference to the *Dataspeed 40/4* case is misplaced. There, we were applying the regulatory structure of the *First Computer Inquiry* and attempting to determine whether the functions performed by a piece of equipment on a customer's premises were primarily "communications" and subject to regulation, or "data processing" and unregulated. We abandoned this regulatory approach in our *Second Computer Inquiry* and deregulated all such equipment located on the customer's premises.

[19] 47 C.F.R. §§ 68.1 *et. seq.*

[20] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, CC Docket 85-229, FCC 86-252 (released June 16, 1986) (*Computer III*), paras. 100-265.

[21] The fact that enhanced services operations of carriers can often be efficiently collocated with, and in some cases integrated into, network services equipment makes such equal access issues potentially more complex for enhanced services than for CPE. For similar reasons, designing appropriate nonstructural safeguards, including cost allocation rules, is in certain respects more complex for enhanced services than for CPE.

[22] Furthermore, in light of the fact that our *Computer III Order* established somewhat different nonstructural safeguards, including those of Comparably Efficient Interconnection and Open Network Architecture, GTE's argument that the *AT&T Structural Relief Order* prejudged the *Computer III* proceeding is clearly without merit.

IV. Nonstructural Safeguards Applicable to AT&T's Provision of CPE

A. Network Disclosure

11. In the *AT&T Structural Relief Order*, we reaffirmed our previous conclusion that AT&T's interexchange network can have an important impact on interconnection standards for CPE and concluded that AT&T should continue to be required to disclose information about new network services or changes in existing services that would affect CPE interconnection.[23] We further concluded that our existing disclosure rules would not be effective in the absence of structural separation. Thus, we modified our rules to require AT&T to disclose a change in the network or new network service that would affect the interconnection of CPE with the network at the "make/buy" point, *i.e.*, at the time AT&T makes a decision to manufacture itself or to procure from an unaffiliated entity, any product the design of which affects or relies on the network interface.[24] AT&T is then required to provide to the public a general description of the service. AT&T also is required to disclose technical and marketing information about the service to CPE vendors and manufacturers that are willing to sign nondisclosure agreements.[25] AT&T must provide this information to a CPE vendor or manufacturer within a reasonable time after the signing of the nondisclosure agreement,[26] but not more than 90 days thereafter.[27] AT&T is also required to disclose technical information to the public six months before the introduction of a new network service or network change that affects CPE interconnection and marketing information when the new service or change is announced.[28]

1. Positions of Parties

12. A number of petitioners ask us to reconsider various aspects of the network disclosure rules established for AT&T in the *AT&T Structural Relief Order*. Several petitioners question

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[23] *AT&T Structural Relief Order*, 102 FCC 2d at 684, para. 49.

[24] *Id.* at 686, para. 53.

[25] As part of a nondisclosure agreement, AT&T is permitted to include provisions that will prohibit entities receiving AT&T network information from providing that information to their non-CPE personnel or to any third party.

[26] *See AT&T Structural Relief Order*, 102 FCC 2d at 687, para. 53, and *Disclosure Order*, 93 FCC 2d at 1236–38, paras. 31–38, for a discussion of the specific information AT&T is required to disclose subject to nondisclosure agreements.

[27] *AT&T Structural Relief Order*, 102 FCC 2d at 687, para. 53.

[28] *Id.* at 688, para. 54.

our decision to use the make/buy point as the primary trigger for the disclosure obligation. IDCMA argues that our reliance on make/buy is inappropriate and unworkable because that concept is too vague and may not provide disclosure until too late. IDCMA contends that information about network changes may be provided to AT&T's CPE designers long before AT&T claims that it has decided whether or not to "make" a product or "buy" it. Thus, according to IDCMA, AT&T's CPE competitors may not obtain access to valuable network information until long after AT&T CPE personnel have begun the development of new equipment. IDCMA further contends that our *Disclosure Order*,[29] in which we addressed the disclosure obligation for AT&T when it was subject to structural separation, specifically rejected make/buy as the sole trigger of disclosure because it would not provide timely disclosure in some instances.[30] IDCMA suggests, therefore, that we should reinstitute an important element of the disclosure obligation established in the *Disclosure Order* and require AT&T to disclose information about new network services or changes in the network whenever such information is used by AT&T personnel in the design or development of CPE.

13. Other parties argue that, although our use of a make/buy trigger is logical and reasonable, specific determination of the make/buy point could be difficult. GTE argues, for instance, that if AT&T were to make incremental changes to an existing software or hardware product, there would be no well-defined point that would trigger the disclosure obligation. Consequently, GTE suggests we should obtain additional public comment before adopting final disclosure rules. CCIA, NATA, and IDCMA argue that an ambiguity exists in our definition of the make/buy standard in the *AT&T Structural Relief Order*.[31] They note that in the text we refer to make/buy as the time AT&T makes a decision to produce or manufacture any product that affects or relies on the network interface, while in a footnote we refer to a decision by AT&T to develop CPE as the event triggering the disclosure obligation.[32] NATA and IDCMA argue that we should resolve this ambiguity by clarifying that there are two tests for disclo-

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[29] Computer and Business Equipment Manufacturers Association, *Report and Order*, 93 FCC 2d 1226 (1983).

[30] IDCMA Petition at 15.

[31] IDCMA argues that, while we should adopt its primary suggestion and abandon make/buy as the primary trigger point of the disclosure obligation, *see supra* para. 12, if we decide to retain make/buy, we should resolve this asserted ambiguity.

[32] *See* CCIA Petition at 10–11.

sure: (1) when AT&T makes a decision to make or buy products affecting the network interface, and (2) when AT&T makes a decision to develop CPE that relies on a proposed change to the network or a proposed new service.[33] They argue that this clarification addresses the ambiguity and, by ensuring that all CPE manufacturers obtain network information at the same time AT&T's personnel begin to design new CPE, eliminates the headstart AT&T's design personnel would obtain under the existing rules. AT&T argues that no clarification is necessary, noting that we expressed an intent in the *AT&T Structural Relief Order* to use make/buy as it was defined in the *Disclosure Order*. It contends that the *Disclosure Order* definition was based on a decision to make or buy a product and not a decision to develop CPE.[34]

14. A second aspect of our network disclosure rules about which parties seek clarification or modification is our decision to permit AT&T to use nondisclosure agreements as part of the disclosure process. Northern Telecom (Northern) argues that the network disclosure rules established in the *AT&T Structural Relief Order* could require CPE manufacturers that also manufacture network equipment to institute a form of structural separation in their operations if they wish to obtain network information from AT&T. Northern notes that the Order permits AT&T to require that entities in the CPE industry sign agreements prohibiting them from disclosing AT&T information outside their CPE operations before receiving information about network changes or new network services. Northern argues that its CPE and network equipment technical personnel work in close proximity to one another, and in some cases, are the same people. Thus, Northern contends, in order to sign a nondisclosure agreement with AT&T, it would have to separate its CPE and network equipment operations and impose restrictions on the free flow of information within its company similar to those we found mandated relief from structural separation for AT&T. Northern requests that we clarify that nondisclosure agreements do not require a company to prevent non-CPE personnel from obtaining access to AT&T-provided information so long as that company agrees to refrain from providing that information to AT&T's network services competitors.[35] In opposition to Northern, AT&T

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[33] NATA Comments at 3; IDCMA Petition at 13-14.

[34] AT&T Opposition at 9-10.

[35] Although Northern indicates that it would have no problem agreeing to retain information within its company, it asserts it could not, absent structural separation, prevent information disclosed by AT&T from reaching its network equipment personnel. Thus, it would not be able to sign an alternative form of

argues that companies such as Northern, if permitted to make unlimited internal use of disclosed information, could incorporate that information into the design of network equipment sold to AT&T's network services competitors. AT&T contends that this use of its proprietary network information allows its competitors to obtain an unwarranted competitive advantage in direct conflict with the Commission's stated goals in the *AT&T Structural Relief Order*. Therefore, AT&T urges that Northern's request for clarification be denied.

15. CCIA and NATA also attack the use of nondisclosure agreements, arguing that such agreements provide AT&T with an unfair competitive edge in selling CPE for its new or changed network services. They argue that many CPE customers are highly interested in the technical specifications of proposed new AT&T services to determine if they would be interested in subscribing to such services and, consequently, in purchasing CPE designed for those services. These parties further argue that non-AT&T vendors cannot provide such information because of the nondisclosure agreements, but that AT&T can, and does, provide such information to its customers in order to sell CPE. They ask that AT&T's CPE competitors be permitted to disclose information to their customers if AT&T discloses such information to its customers.

16. CCIA, NATA, IDCMA, and others also contend that AT&T should be required to provide information to vendors once a nondisclosure agreement is signed in a more timely fashion than the 90 days currently permitted by the *AT&T Structural Relief Order*. They argue that a period such as 15 days would provide AT&T with sufficient time to compile the information and would provide parties receiving disclosure with a better opportunity to develop CPE for new AT&T services prior to their implementation.[36]

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nondisclosure agreement suggested by AT&T certifying that it would not use disclosed information for non-CPE purposes until the public disclosure of that information. In this regard, Northern argues that, under the law pertaining to nondisclosure agreements, it would have the burden to demonstrate that the information provided by AT&T was not used in developing new network equipment. Thus, if it and AT&T were both developing a similar new service and it obtained information about AT&T's service subject to a nondisclosure agreement, Northern would have the very difficult task of establishing that it had not made some use of AT&T's information.

[36] Several parties argue that, given all the uncertainty surrounding nondisclosure agreements, AT&T should submit sample nondisclosure agreements to the Commission and should be required to obtain our approval before using such agreements.

17. A number of parties express concern about the timing of public disclosure. NATA argues that our decision in the *AT&T Structural Relief Order* requiring AT&T to disclose information to the public only six months before implementing a network service does not provide entities that are unable to enter into disclosure agreements with sufficient time to develop CPE for new network services. NATA cites a study that purportedly found 20 months to be an average length of a CPE design cycle. NATA therefore argues, with support from IDCMA, that public disclosure should occur 18 months before AT&T's introduction of a network service, rather than the six months required in the *AT&T Structural Relief Order*. GTE, raising similar arguments, suggests that public disclosure of technical information should occur 12 months in advance of the implementation of a new or changed network service.

18. AT&T argues that we should not lengthen the public disclosure period. It argues that most CPE manufacturers will obtain network information at the make/buy point, which almost always will be earlier than six months before implementation of a new service. AT&T argues further that, even though CPE development can take longer than six months, meeting new network interface standards is only one small aspect of the overall design process and does not implicate the entire product development cycle from start to finish. Thus, it claims that information about the network interface is frequently not required by a CPE designer at the beginning of the CPE development process and may not be required until that process is well underway.

19. Several parties also contend that more entities should be entitled to receive network information subject to nondisclosure agreements and that more information should be disclosed. For example, some parties ask that we clarify that the "vendors" entitled to obtain information from AT&T includes entities engaged in the leasing, but not the sale, of CPE. They argue that companies leasing CPE have the same need for such information as do companies selling CPE. In addition, NATA contends that trade associations should be entitled to obtain information from AT&T at the make/buy point.

20. Parties further argue that AT&T should be required to provide more information than that specified in the *AT&T Structural Relief Order*. IDCMA notes that all Commission-ordered disclosure occurs before a new service or change is operational. IDCMA argues, however, that AT&T may frequently discover information about existing network services from its

operational experience, information that may be of value to CPE vendors attempting to develop new CPE or improve existing CPE compatible with those services. Therefore, IDCMA argues, we should require AT&T to provide to the public any information it discovers about its existing network services after those services become operational. In addition, IDCMA urges that we require AT&T to provide the public with a list of the publicly available information about its network. Noting that BellCore makes available a listing of such technical information for the BOCs' networks, IDCMA argues that a similar list of AT&T information would be valuable because it is very difficult to discover what information is available. It further argues that if AT&T were required to update this list frequently (weekly or monthly), it would provide an effective means of informing the public of new service offerings for which AT&T is required to disclose network information subject to nondisclosure agreements.

2. Discussion

a) Use of Make/Buy Point as Trigger for Network Disclosure Obligation

21. We reject the arguments made by IDCMA and others[37] and find that the make/buy standard is not so inherently vague and unworkable as to require replacement with another trigger for network disclosure. IDCMA has not presented any new information that causes us to alter our previous conclusions on AT&T's network disclosure obligation, nor has it presented any evidence supporting its contention that disclosure at the make/buy point is ineffective. We note, for instance, that IDCMA's proposed replacement for the make/buy standard, which would require disclosure of information whenever it is transmitted to AT&T CPE personnel, was specifically rejected in the *AT&T Structural Relief Order*.[38] Furthermore, contrary to IDCMA's arguments, we did not specifically reject the make/buy standard in the *Disclosure Order* as too vague to serve as the sole trigger for disclosure. Instead, we concluded that the standard might be insufficient in some cases if the disclosure obligation were triggered only when

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[37] *See supra* paras. 12-13.

[38] We there concluded that such a rule "might well require disclosure of information at a very early stage of the design process" and that this could "lead to premature disclosure of many of AT&T's preliminary plans for its network or ... cause AT&T to reinstitute the types of artificial and inefficient restrictions on internal information flows that ... [we seek] to remove." *AT&T Structural Relief Order*, 102 FCC 2d at 684-85, para. 50.

AT&T made a make/buy decision for a product that *affects* the network interface. Therefore, we expanded the make/buy point to include a decision by AT&T to make or buy a product that affects or *relies* on the network interface. It is this expanded make/buy standard that is embodied in the *AT&T Structural Relief Order* as the primary trigger of the network disclosure obligation.

22. Several parties note that in paragraph 53 of the *AT&T Structural Relief Order* we define the make/buy point as the time AT&T "makes a decision to manufacture itself or to procure from an unaffiliated entity, any product the design of which affects or relies on the network interface."[39] They further note that in footnote 84 in that same paragraph we indicate that "if AT&T makes a decision to develop a new type of CPE based on a planned interface, that decision will trigger the disclosure obligation."[40] They argue that these descriptions of when the disclosure obligation attaches are not consistent and that we should resolve this ambiguity by clarifying that disclosure should occur (1) when AT&T reaches a decision to make or buy products the design of which affects the network interface, or (2) when it reaches a decision to develop CPE that relies on a proposed interface.

23. To the extent that there may be any ambiguity in the Order, we will restate that the make/buy point is the point at which AT&T makes a decision to make itself or to procure from an unaffiliated entity any product the design of which affects or relies on the network interface. We indicated in footnote 84 that the disclosure obligation attaches when AT&T makes a decision "to develop a new type of CPE based on a planned interface" merely to highlight that make/buy applies not only to AT&T's decision to make or buy products to implement a change in the network, but also to any decision by AT&T to make or buy CPE that would rely on the new or changed network service. We did not intend, as suggested by petitioners' proposed "clarification," to reject the make/buy standard as the disclosure trigger for any product the design of which relies on the network interface and to require instead that AT&T disclose network information as soon as it undertakes any efforts to develop such a product. If the development of CPE for a service is closely linked to the development of the service itself, a disclosure rule of this type could require very early disclosure on the part of AT&T, perhaps even before the network interface is sufficiently final to permit other vendors to begin effective design work on their own CPE.

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[39] *Id.* at 686-87, para. 53.

[40] *Id.* at 686, note 84.

Thus, it implicates the exact concerns that led us to reject the disclosure rule proposed by IDCMA in the *AT&T Structural Relief Order*.[41]

b) Nondisclosure Agreements

24. Northern Telecom, in its petition for clarification,[42] raises important concerns about the impact of nondisclosure agreements on the ability of integrated network equipment and CPE manufacturers to obtain network information from AT&T. It argues that such manufacturers are unable to obtain AT&T network information at the make/buy point because they cannot comply with the conditions contained in nondisclosure agreements prohibiting parties receiving such information from providing it to their non-CPE personnel. Although we recognize that integrated manufacturers may not be able both to retain the advantages of integration and to obtain AT&T network information as soon as nonintegrated CPE manufacturers, we believe that nondisclosure agreements play an important role in the disclosure process. These agreements permit AT&T to protect its legitimate interests in ensuring that proprietary information on its network planning and development efforts is not transmitted to its network services competitors. This protection, in turn, permits us to require the disclosure of network information at a much earlier point in the development of a new network service than we would otherwise have found acceptable.

25. On the other hand, we do not want rules designed to protect AT&T from premature public disclosure of technical information to provide an institutionalized advantage to AT&T in the CPE market vis-a-vis its major CPE competitors. We anticipated in the *AT&T Structural Relief Order* that some CPE competitors would be unable or unwilling to enter into nondisclosure agreements and created a mechanism requiring public disclosure of technical information six months before implementation of a new or changed AT&T network service. Such competitors can begin or modify the design of new CPE in light of new AT&T network services after receiving information at the public disclosure point. Several parties have argued, however, that our current public disclosure requirement provides insufficient opportunity for AT&T's CPE competitors to design and manufacture new CPE prior to AT&T's introduction of a service. They contend

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[41] *See supra* para. 21.
[42] *See supra* para. 14.

that it can take more than 20 months from the beginning of development for CPE to its availability in the marketplace, and that information about the network is crucial to the development and design of new CPE.

26. We recognize that six months may be too short for a viable public disclosure period, especially since it appears that a substantial number of major CPE manufacturers may be unwilling or unable to meet the requirements for obtaining disclosure at the make/buy point. However, in considering possible modification of the public disclosure period, a number of competing concerns must be weighed. First, in the *AT&T Structural Relief Order*, we established disclosure at the make/buy point subject to nondisclosure agreements as the primary means of imparting AT&T network information to entities in the CPE industry; and, for the reasons just discussed,[43] we do not believe that disclosure to the public should replace this primary obligation. Second, lengthening the public disclosure period increases to some degree the possibility that our rules could delay the introduction by AT&T of some new or modified network services. Such delay would occur if, once the earliest possible public release of the network services information had occurred, AT&T were technically able to implement a new or modified service in a period shorter than the required disclosure period. We did not perceive this to be a significant problem with the six-month public disclosure period in the *AT&T Structural Relief Order*. However, if we were to extend this period to 18 or 24 months, AT&T would have to delay introduction of any new or modified services that it would otherwise have been able to implement within this period after the technical parameters had stabilized and could be publicly released. We wish to avoid, to the maximum extent possible consistent with our other regulatory goals in this proceeding, imposing this type of restraint on the offering of new AT&T services.

27. After balancing these various considerations, we conclude that the public disclosure of technical information about a new or changed AT&T network service generally should occur 12 months before introduction of the service.[44] Thus, in the usual case, when the make/buy point occurs more than 12 months before introduc-

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[43] *See supra* para. 24.

[44] We reject the suggestion of some parties that public disclosure should occur at 18 months prior to the implementation of a new service. We believe 12 months is a more appropriate period based on our conclusions about the adverse effects of early disclosure on AT&T's ability to innovate in its network operations. *See supra* para. 26. *See also AT&T Structural Relief Order*, 102 FCC 2d at 684–85, para. 50.

tion of a new network service, disclosure subject to nondisclosure agreements would occur at the make/buy point and public disclosure would occur 12 months before introduction of the service. However, in those instances, if any, in which AT&T is technically able to introduce a new service within 6 to 12 months of the make/buy point, we depart from that general rule. In these circumstances, to maintain the make/buy point as the primary trigger for disclosure to the CPE industry and to avoid delaying services that otherwise could be rapidly implemented, public disclosure may occur at the make/buy point rather than 12 months before introduction of the service. However, AT&T may not introduce a new or modified service sooner than six months after making public disclosure.

28. Some parties also express concern that the use of nondisclosure agreements improperly favors AT&T by permitting it to inform its customers about the technical details of new network services for which it is offering CPE at the same time that its CPE competitors are prohibited by these agreements from providing similar information to their customers. In light of our decision to require public disclosure of technical information 12 months before AT&T's introduction of a new service, it is unclear that AT&T's ability to provide such information to its customers is as great an advantage as these parties suggest; and, therefore, we decline to alter the way in which nondisclosure agreements are employed. AT&T's required public announcement of a new service at the make/buy point will permit CPE vendors to provide their customers with a general description of the new AT&T service for which they will be offering CPE. CPE vendors will also, in most cases, have one full year before introduction of the service in which to inform their customers of its technical characteristics. We find it unlikely that in very many cases potential CPE customers will purchase CPE for a new, untested, nonoperational service more than one year before its implementation. Furthermore, we find that the solutions suggested by these parties would be difficult and expensive to implement and are unwarranted given the relatively limited advantage that might flow to AT&T. If we were to limit AT&T's ability to provide information to its network services customers about new or changed network services because of the relatively slight competitive advantage that might accrue to AT&T in its sales of CPE, we would place it at a substantial disadvantage vis-a-vis its network services competitors and would generally reduce the number of subscribers to new AT&T services, to the disadvantage of AT&T, its network

services customers, and potentially its CPE competitors as well.[45] On the other hand, if we were to permit AT&T's CPE competitors to disclose AT&T-provided network information to their customers, it would be difficult or impossible, because of the possible widespread scope of the resulting disclosure, to ensure that such information did not eventually make its way into the hands of AT&T's network services competitors.[46] Therefore, even though AT&T may have some ability to provide its customers with information about new services and related CPE before its CPE competitors can do so, we do not think that additional regulatory restraints should be imposed on AT&T to remedy this slight advantage.

29. Finally, some parties argue that the *AT&T Structural Relief Order* permits AT&T too much time in which to provide network information once a nondisclosure agreement has been signed. A number of parties argue that 90 days is too long because it will not take AT&T that long to compile and prepare the information it is required to produce. They contend that AT&T has ample time prior to the make/buy point to take the steps required to prepare information for release. They further contend that the three-month delay substantially disadvantages AT&T's CPE competitors in the development of competitive CPE. We agree and conclude that 30 days would be a more reasonable period for AT&T to provide information. Therefore, once AT&T signs a nondisclosure agreement, it will be required to provide information within a reasonable period, not to exceed 30 days.

c) Other Network Disclosure Issues

30. Various parties ask that we clarify our disclosure rules to ensure that the entities entitled to information subject to nondis-

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[45] While we believe AT&T should be permitted to make information about its network services available to potential customers for those services, we do not think AT&T should be permitted to enforce nondisclosure agreements against its CPE competitors if the same information has been openly disclosed to AT&T customers. We would assume that AT&T would limit its disclosure of network information about new or changed services to customers who provide assurances that the disclosed information would be treated as confidential material. Otherwise it would appear that the information would no longer be "secret," and public disclosure would be permissible for all parties in possession of the information.

[46] Even if such disclosure were to be made subject to some form of nondisclosure agreement, it is unlikely that control over the information could be effectively restricted. There would be no limitations on the numbers of parties that would have access to AT&T network information since CPE vendors would be free to disclose to all of their customers, and as a consequence, AT&T would not be in a favorable position to enforce the resulting nondisclosure agreements.

closure agreements include both lessors of CPE and trade associations. We agree that the former should be able to obtain information at the make/buy point from AT&T. In the *AT&T Structural Relief Order*, we specifically included "vendors" of CPE among the entities entitled to obtain disclosure. We see little, if any, difference in the need for this information between parties that sell CPE and those that lease it. Thus, we clarify that the term "vendors" includes both sellers and lessors of CPE. We do, however, reaffirm our conclusion in the *AT&T Structural Relief Order* excluding trade associations from the entities entitled to obtain disclosure. We believe that entities not directly participating in the CPE marketplace as a designer, manufacturer, or supplier of CPE do not need such information. Because trade associations perform none of these functions, we conclude that they should continue to be excluded from the class of entities entitled to disclosure at the make/buy point.

31. Parties also ask us to require AT&T to provide vendors and manufacturers of CPE with information developed about its network services after they are operational. We agree that disclosure of such information by AT&T, if expressly limited to information that would have been subject to disclosure at the make/buy point, would produce benefits. This information might help CPE manufacturers design new generations of CPE compatible with a particular service or enable CPE vendors selling CPE from several manufacturers to select the equipment best suited for a customer's particular needs. Moreover, there would seem to be few competitive costs to AT&T from disclosing such information. Once a service is operational, AT&T's network services competitors would already have access to the basic technical information on the operational service. Consequently, requiring AT&T to provide information developed from operational experience would not seem to provide its competitors with additional benefits. Furthermore, we believe that the provision of such information is implicit in the network disclosure obligation we promulgated in the *AT&T Structural Relief Order* and in the *All Carrier Rule*.[47] The goal of our disclosure rules is to ensure that entities designing equipment or services that rely on the network have sufficient information about the network to make effective use of it. Operational information is important for that purpose. Accordingly, we clarify that our existing rules require AT&T to

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[47] 47 C.F.R. § 68.110(b). The *All Carrier Rule* requires all carriers to provide information about the network reasonably in advance of the implementation of a new network service.

provide to the public any information it discovers about its operational network services, if such information would have been subject to disclosure had AT&T been aware of it at the make/buy point.[48]

32. Finally, we decline IDCMA's request to adopt rules governing the procedures AT&T must adopt to provide an index to its publicly available network technical information. We assume, since no party has alleged an unwillingness on the part of AT&T to provide, upon request, a listing or other reference material on the available network technical information, that AT&T will make such information available in its technical publications and elsewhere and that it will provide this information to interested parties for a reasonable fee that recovers its costs. Therefore, we will not impose specific rules on AT&T concerning such listings.

B. Discrimination in Access to Network Services

1. Quality Reports

33. In the *AT&T Structural Relief Order*, we perceived some potential for AT&T to provide its CPE customers with preferential access to its network service in violation of sections 202(a) and 202(b) of the Communications Act.[49] We were also concerned about the possibility that AT&T sales personnel might make claims that by purchasing AT&T CPE the customer would obtain quicker installation or maintenance of network services or higher quality network services than if the customer purchase CPE from another vendor. To address these concerns we required AT&T to file with us both its procedures for determining how requests for installation and maintenance would be processed and monthly reports on the time periods required for installation and maintenance of its network services, cross-indexed by the type of CPE (AT&T v. non-AT&T) an end-user possesses. We also indicated that we believed AT&T would take the necessary steps to ensure that its sales force did not engage in, or make improper representations concerning, such discrimination.

a. Positions of Parties

34. IDCMA and CCIA argue that the Commission should require AT&T to file monthly reports comparing the quality of

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[48] Of course, AT&T is required to correct any information already provided that it subsequently determines to have been incorrect or to have changed.

[49] 47 U.S.C. §§ 202(a)-(b).

network services AT&T provides to its own, and to its competitors', CPE customers.[50] They contend that AT&T can easily discriminate in the service quality it provides and that such discrimination can severely disadvantage AT&T's CPE competitors and their customers. They further contend that the data communications industry is particularly susceptible to such discrimination because it depends on terrestrial private lines, over which AT&T has a virtual monopoly. IDCMA contends that data communications manufacturers design their equipment on the basis of the quality of the underlying services and AT&T could design its CPE to less exacting tolerances than its competitors if it could be certain that its CPE customers would consistently obtain better quality service.

35. AT&T strongly opposes any requirement that it provide monthly quality reports. It does not dispute the utility of quality reports to detect certain types of discrimination or challenge the specific quality measurements suggested by the other parties. Rather, it argues that its procedures for assigning specific circuits to particular customers preclude discrimination in service quality on the basis of a customer's CPE. It further argues that the pertinent quality data are unavailable, limited, or difficult to document.[51]

36. With respect to the efficacy of its procedures in preventing discrimination, AT&T maintains that its personnel assign specific circuit elements to individual circuit orders on a "first-come, first-served" basis.[52] It indicates that this assignment neither depends on, nor is affected by, the type of the customer's CPE.[53] Moreover, it argues that AT&T-C personnel cannot obtain access by computer to AT&T Information Systems' CPE information.[54] Therefore, AT&T contends, it cannot assign circuits of a higher quality based on a customer's purchase of AT&T CPE.

37. AT&T says that there is no computer data base available to provide the information needed for quality reports.[55] Rather, it asserts, quality results are recorded manually and stored on hard

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[50] IDCMA argues that such quality reports should measure the C-notched noise level for analog private line services, the phase jitter measure for 1.544 Mbps services, and some appropriate measurement for digital, data-phone services (DDS). IDCMA Preliminary Comments at 25-27; IDCMA Petition at 31. CCIA argues that quality reports should indicate whether AT&T's analog services exceed the minimum limits set by tariff.

[51] AT&T Opposition at 21.

[52] AT&T 85-26 Nondiscrimination Plan at 5.

[53] AT&T Opposition at 21 n. * .

[54] *Id.* at 21.

[55] *See id.*

copies. Furthermore, AT&T argues that the development of a centralized computer system to record and analyze quality information would be costly and cumbersome.[56] Thus, AT&T contends that requiring quality reports would impose substantial administrative costs and burdens and would conflict with the Com mission's objective of "minimal intrusion into AT&T's existing order processing procedures."[57]

38. Finally, AT&T argues that it no longer conducts end-to-end tests of circuits, but merely tests the inter-LATA portion of the line. AT&T observes that the local exchange companies (LECs) control two-thirds of the circuit and that merely combining AT&T and the LECs test results would not provide an adequate end-to-end quality measure. It contends that AT&T and the LECs test at different times and the LECs can, and do, change the facilities they dedicate to a particular circuit without notice. Thus, AT&T claims that the quality of a circuit could change over time as the BOC changes the facilities dedicated to that circuit. Therefore, it asserts that any quality report it might provide would not be a valid indicator of an end-user's overall service quality.

39. In response, IDCMA maintains that automated systems are in fact available to AT&T that are capable of electronically recording quality information and making it available for simple retrieval on an individual or aggregated basis. IDCMA further maintains that, although a single system evidently is not yet in use for all its services, AT&T has already deployed automated systems for its private line circuit records.[58] Finally, IDCMA argues that AT&T has the capacity under its Tariff 11 to test the quality of an end-to-end circuit, and not just the inter-LATA portion of that circuit.

b. Discussion

40. In the *AT&T Structural Relief Order*, we expressly cited the potential for AT&T to provide superior quality network services to its CPE customers on a selective basis as an example of possible discrimination. We also expressed the concern that, regardless of the service quality AT&T actually provides, its sales personnel might make representations to potential CPE customers

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[56] AT&T contends that only one-fifth of all monthly circuit orders require C-notched noise tests, and thus such information is only available in limited quantities.

[57] *AT&T Structural Relief Order*, 102 FCC 2d at 685, para. 51.

[58] IDCMA Preliminary Comments at 23.

that superior quality service would be available if they purchase AT&T's CPE.[59] We find that these concerns are still valid, and we reaffirm our view that such discrimination is prohibited under the *AT&T Structural Relief Order* and the Communications Act. We also conclude, however, that AT&T should not be required to file monthly quality reports. In light of AT&T's existing procedures for processing orders and recording the quality of the service provided, requiring such quality reports could impose substantial costs and administrative burdens on AT&T.[60] Further, such reports appear to be largely unnecessary to prevent improper discrimination.[61] Accordingly, we will follow an alternative, less intrusive approach to ensure that AT&T does not discriminate in the quality of the network services it provides.

41. AT&T indicates, in its opposition, that it assigns particular circuits to its customers on a "first available" basis so long as a circuit meets the minimum tariff requirements and that this assignment procedure does not allow it to discriminate in the quality of circuits it assigns. We do not believe, however, that either AT&T's nondiscrimination plan filed in response to the *AT&T Structural Relief Order* or its filings in this proceeding

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[59] *AT&T Structural Relief Order* at para. 60.

[60] Because it appears that AT&T does not presently have information on quality available in electronic form, requiring AT&T to prepare reports on the quality of the basic services it provides cross-indexed by the type of CPE an end-user possesses would impose substantial costs.

[61] In the *AT&T Structural Relief Order*, we required AT&T to file monthly reports on the time intervals for the installation and maintenance of the network services it provides to its CPE customers and the customers of its CPE competitors. For several reasons, however, we do not believe that such reports are the most effective and efficient means to prevent AT&T from discriminating in the quality of the service it provides. First, while it is relatively easy for AT&T to prepare reports on the timing of network services because the information is available in AT&T's computer databases, as we have noted, the necessary quality information is not available in AT&T's computers and would be difficult to obtain. Second, in general it is easier for AT&T to provide service to its CPE customers in a more timely fashion than it is for it to provide superior quality service. The former discrimination merely requires that AT&T expedite the provisioning process from the service order centers, while the latter requires that AT&T managers or salesmen specifically order installation and maintenance personnel to select individual circuits with specified quality parameters. Third, since AT&T does not control the entire circuit, it would be difficult for it to provide and maintain end-to-end quality at a particular level. Fourth, AT&T asserts that its present system does not permit discrimination in service quality. If this is so, and we require AT&T to document this representation in some detail, see *infra* para. 41, monthly reports are unnecessary. Therefore, we conclude that a monthly reporting requirement on quality would be inconsistent with our objective of intruding on AT&T's internal procedures only to the extent necessary to ensure our regulatory goals are achieved.

adequately demonstrate that it has established procedures to ensure the "blind" processing of all network services. We therefore require AT&T to amend its nondiscrimination plan to demonstrate, in convincing detail, that its circuit assignment procedures are incapable of permitting the assignment of higher quality circuits to AT&T CPE customers or lower quality circuits to competitors' CPE customers. Specifically, AT&T's revised plan should provide a detailed description of its circuit processing procedures, the personnel who are involved in administering those procedures, and the various types of records that are used and maintained in this process. Further, it should indicate which, if any, of its circuit assignment procedures could be employed for a discriminatory purpose and what steps it has taken to remedy any potential discrimination. For example, the amended plans should indicate whether there is any opportunity for oral or written communications between AT&T personnel through which circuit quality could be changed in favor of customers who utilize AT&T CPE. In addition, AT&T should explain in detail the measures it uses to test the quality of the disaggregated services specified in the *AT&T Plans Order*[62] and what measures are actually recorded.[63] We delegate authority to the Bureau Chief to review AT&T's amended nondiscrimination plan to ensure that it provides procedures fully adequate to prevent discrimination in quality.

42. Furthermore, we also require that AT&T's compliance with this amended nondiscrimination plan be part of the independent audit already required for AT&T's accounting plan.[64] These audits are to occur on a yearly basis and the results are to be filed with the Commission. If such audits should reveal significant deviation from AT&T's amended plan or actual discrimination in quality of service, an enforcement action may be instituted against AT&T and/or it may be required to file monthly quality reports. Finally,

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[62] *See supra* note 4. In that Order, the Bureau has required AT&T to disaggregate its monthly installation and maintenance reports, by breaking down the "private line" category into a number of specific service categories.

[63] Of course, if AT&T modifies the procedures described in its amended nondiscrimination plan or adopts a new procedure that it would have been required to include in its amended plan, it must promptly update its plan to explain not only the new or modified procedures, but also the accompanying safeguards that ensure continued nondiscrimination. We note this requirement particularly in light of the recently announced consolidation of AT&T–IS and AT&T–C into a single customer sales unit for equipment and services, which potentially could change, either immediately or in the near future, the procedures summarized by AT&T in its pleadings in this proceeding. *Communications Weekly*, May 19, 1986, at 1.

[64] *See, e.g., AT&T Structural Relief Order*, 102 FCC 2d at 699, para. 78.

we reaffirm our view that representations by AT&T sales personnel to potential CPE customers that superior quality lines will be assigned on the basis of CPE choice, even if false, would constitute serious violations of the *AT&T Structural Relief Order* that would require corrective measures.

2. *More Detailed Monthly Reports*

a. Positions of the Parties

43. IDCMA and CCIA contend that AT&T's monthly nondiscrimination reports are insufficient to prevent or detect discrimination.[65] They suggest that we require AT&T to prepare more detailed monthly reports that are organized by service category and list each installation and maintenance order, including the individual private line circuit number,[66] the restoration interval, and an indication whether AT&T or non-AT&T CPE is connected to the circuit.[67] IDCMA recommends that these more detailed reports be supplied by AT&T to interested CPE suppliers and customers at a reasonable cost, while CCIA suggests that these data be added to the monthly nondiscrimination report AT&T is required to file with the Commission.[68]

b. Discussion

44. In the *AT&T Plans Order*, the Bureau has required AT&T to further disaggregate its private line service category to facilitate our ability to detect any discrimination in AT&T's provision of network services.[69] The Bureau found that with this disaggregation the current reporting requirements are sufficient to provide a check on possible discrimination by AT&T.[70] We agree. The extra detail that will now be included in AT&T's monthly reports responds in part to the concerns raised by IDCMA and CCIA in their petitions. We conclude that the additional reporting these petitioners request, which as they implicitly knowledge goes beyond the scope of the reporting requirement established in the

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[65] IDCMA Petition at 29-30; CCIA Petition at 13.

[66] IDCMA asserts that use of the circuit number, rather than the customer's name would address customer privacy concerns.

[67] IDCMA Petition at 30; CCIA Petition at 13.

[68] *Id.*

[69] More specifically, the Bureau has required AT&T to divide its private service category into three subcategories of analog service — unconditioned, C-conditioned, and D-conditioned — and three subcategories of digital service — 56 Kbps, "subrate" DDS, and high capacity (T1). *See* AT&T Plans Order, *supra* note 4, at paras. 15-16.

[70] *Id.* at para. 17.

AT&T Structural Relief Order, would be unnecessary and unduly burdensome, and we decline to adopt it.[71]

C. Customer Proprietary Network Information

45. In the *AT&T Structural Relief Order*, we concluded that our rule prohibiting carriers from providing CPNI to their separate subsidiaries, unless such information is provided to the public on equal terms and conditions, would no longer be applicable to AT&T's unseparated CPE operations. We further found that there was no easy way to preserve effectively the equality of access to CPNI that our then-existing rule had been designed to achieve. We did determine, however, that we could take certain steps to make CPNI available to competing vendors and preserve its confidentiality. First, we decided that AT&T should be required to provide a customer's CPNI to other entities at the customer's request. With this requirement we attempted to ensure that all vendors would have access to the information required to design a communications system or prepare a competing bid for a customer. Second, we found that some AT&T network services customers might desire that their CPNI be available only to AT&T network services personnel with no involvement in CPE sales, and we required AT&T to establish procedures that would permit network services customers to obtain network services on that basis. Finding as well that AT&T only has useful CPNI for its largest and most sophisticated customers, who are likely to solicit bids from several CPE vendors before making a purchase, we concluded that these procedures would be sufficient to address the concerns raised by AT&T's access to CPNI.

1. Positions of Parties

46. CBEMA and GTE argue that AT&T's access to CPNI provides it with a substantial competitive advantage in marketing CPE. They contend that the costs associated with identifying potential customers are among the most significant costs of marketing CPE and that such costs are substantially reduced for AT&T because of its access to CPNI. In addition, CBEMA claims that AT&T's knowledge of its customer's network services requirements permits it to "get in the door first" with a proposal on CPE associated with the customer's new network services. CBEMA contends that the vendor making the first proposal is in a substantially better position than its competitors, and that this

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[71] Of course, AT&T remains free to provide such information if it so chooses.

advantage is magnified in the case of AT&T because of its ability to provide "one-stop shopping." CBEMA argues, therefore, that the safeguards we adopted in the *AT&T Structural Relief Order* are inadequate. CBEMA suggests that a better approach would be to require AT&T to provide written notice to the customer, when using that customer's CPNI in a CPE proposal, that the customer could prohibit AT&T from using its CPNI to market CPE, allow AT&T to use such information only if it is given to other CPE vendors, or allow AT&T to use the information without restrictions. CBEMA suggests this approach would equalize some of AT&T's advantage, although it would still permit AT&T to use CPNI to identify potential customers.

47. GTE argues that the rules adopted in the *AT&T Structural Relief Order* create a "double standard" and suggests that CPNI disclosure rules should be symmetrical between AT&T and its CPE competitors. GTE proposes that both AT&T and its competitors be denied access to CPNI unless the customer affirmatively grants access, or alternatively, they both be provided with access unless the customer requests that it be withheld. NATA voices similar complaints about the policies we adopted in the *AT&T Structural Relief Order* and argues that all AT&T network services customers should be accorded a presumption of confidentiality for their CPNI.

48. Other parties argue that low customer awareness limits the usefulness of our CPNI rules. They contend that the majority of customers are unaware of their ability to withhold CPNI from AT&T CPE marketing personnel and their right to have CPNI made available to non-AT&T CPE vendors. IDCMA argues that customers should be informed by AT&T that: (1) AT&T will not discriminate in its provision of network services on the basis of a customer's CPE purchases; (2) there are numerous CPE suppliers other than AT&T that can provide equipment for AT&T services; (3) AT&T will make CPNI available to other CPE vendors at the customer's request; and (4) the customer has the right to deal with transmission services personnel who are not involved in the sale of CPE. CCIA asks us to clarify how we expect customers to learn of the right to confidential treatment for CPNI that we established in the *AT&T Structural Relief Order*.

49. AT&T argues that no new restrictions need be imposed on its ability to use CPNI in marketing CPE. AT&T argues that one of the prime goals of structural relief was to permit it to use all the information and resources at its disposal to better serve its customers' telecommunications needs. AT&T contends that cus-

tomers would not reasonably expect that access to CPNI would be limited within the company, but would expect that their proprietary information would not be disclosed to third parties without permission. AT&T further contends that the suggestions put forth by CCIA, IDCMA, CBEMA, and NATA would require even the most routine contacts between AT&T and its customers to be burdened with bureaucratic requirements and substantial amounts of red tape.

2. Discussion

50. We continue to believe that the procedures we adopted in the *AT&T Structural Relief Order* adequately address the most significant problems with AT&T's access to CPNI, and we conclude, based on the present record, that additional restrictions on AT&T are unwarranted. In the *AT&T Structural Relief Order*, we were confronted with several competing considerations in developing rules to govern AT&T's use of CPNI in the absence of structural separation. On the one hand, we could attempt to provide all entities with equal access to AT&T Communications (AT&T-C) CPNI by prohibiting AT&T CPE personnel from obtaining any access to that information. Such an approach, however, would have undermined AT&T's ability to engage in joint marketing of CPE and network services, a significant benefit to AT&T and its customers that we believed would result from the removal of structural separation, because network services personnel who also market CPE would have been unable to obtain access to the CPNI they need. On the other hand, we could have provided all CPE vendors with access to AT&T-C CPNI, but this would eliminate network services customers' legitimate expectation of privacy. Faced with this dilemma, we imposed the requirements of vendor access with customer permission and confidentiality at the customer's request.

51. No parties filing pleadings in this proceeding dispute that the rules we adopted in the *AT&T Structural Relief Order* adequately protect customers' rights to obtain confidential treatment for their CPNI or that they provide customers with the opportunity to make their CPNI available to vendors. The primary contention of parties requesting modification is that these rules allow AT&T to use the CPNI in its possession to obtain a competitive advantage in its CPE marketing efforts by identifying potential CPE customers at less cost than other vendors. As we indicated in the *AT&T Structural Relief Order*, we do not believe that any advantage that AT&T may obtain from

its CPNI is significant enough to warrant the imposition of further requirements that would be burdensome to implement and confusing to customers. The competitive conditions prevailing in the telecommunications market are well documented.[72] AT&T has lost more than 70 percent of its CPE market share from monopoly days, and the competitive alternatives to its CPE are numerous and well-known. Further, AT&T's dramatic loss of market share demonstrates that the vast majority of CPE customers are aware of, and in many cases are taking advantage of, their alternatives to AT&T.[73] Consequently, we find it improbable that CPE customers are making substantial purchases on the basis of a single proposal without even bothering to inquire into potential alternative suppliers.

52. In addition, we do not believe the CPNI possessed by AT&T is particularly useful in identifying its customers' CPE needs. For the vast majority of its customers, AT&T only provides MTS or WATS, neither of which is an especially good indicator of a customer's CPE requirements. AT&T's CPNI for its private line customers, although providing some indication of their CPE requirements, may not be as good an indicator as information possessed by the customer's current CPE vendor or other publicly available information, such as information on the nature and extent of the customer's business. Consequently, we reaffirm our conclusion in the *AT&T Structural Relief Order* that the two CPNI requirements established therein are fully sufficient to protect the public interest.[74]

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[72] *See, e.g.,* NATA, *1985 Statistical Review: Annual Market Study of the Telecommunications Equipment Industry* 10, 19 (1985). *See also AT&T Structural Relief Order*, 102 FCC 2d at 677, para. 36 n. 63; Provision of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, *Notice of Proposed Rulemaking*, CC Docket No. 86-79, FCC 86-113 (released March 28, 1986) (*BOC Structural Relief NPRM*) at para. 32.

[73] In light of these developments in the marketplace, we find it difficult to accept the view of CPE customers suggested by some parties in this proceeding as uninformed consumers willing to accept the first bid that is provided to them or to purchase from AT&T because it is, or was, "the telephone company."

[74] Were the potential anticompetitive affects from AT&T's use of CPNI more pronounced, or were customers being disadvantaged in some way, we would be more inclined to impose additional costs on AT&T. For instance, we have tentatively concluded that the use of CPNI by the BOCs to market CPE will implicate costs greater than those we have found for AT&T, and we have proposed restrictions on their use of CPNI that are much more costly than those we have adopted for AT&T. *See BOC Structural Relief NPRM, supra* note 72.

53. Nevertheless, the claim that customers that might find it in their interests to invoke their CPNI rights are not doing so because they are not aware of these rights may be valid. While, in general, we do not require carriers to inform end-users of changes in our rules because of the expense of such notification, in this case our CPNI rules require customers to take affirmative action in order to exercise their rights, which they will be unable to do if they are unaware of these rights. Therefore, we have decided to require AT&T to notify all of its WATS and private line customers[75] of their rights under our CPNI regulations. Such notification should occur within 180 days of the release of this Order through an insert in AT&T's billing materials. The notification should be limited to a description of the CPNI regulations described in the *AT&T Structural Relief Order*.[76]

D. Accounting Safeguards

54. IBM's petition for reconsideration and a number of parties' comments focused on the accounting requirements established in the *AT&T Structural Relief Order* for AT&T's unseparated provision of CPE.[77] They challenge many aspects of our requirements, as well as the specifics of the plans AT&T was required to file to implement those requirements. Ordinarily, we would address these accounting issues in this reconsideration order. However, because we have recently initiated another proceeding dealing precisely with the cost allocation requirements applicable to the provision of all unregulated goods and services by regulated common carriers,[78] we do not believe it is in the public interest to reevaluate here the requirements we adopted in the *AT&T Structural Relief Order*. We will place any pleadings in this reconsideration proceeding that address issues raised in the *Joint Cost Notice* in the docket file for that proceeding. To the extent a reconsideration pleading addresses specific aspects of the account-

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[75] We limit the requirement to these customers in order to reduce the expense of the notification requirement by focusing it on those customers whose CPNI is likely to be of any potential value in marketing CPE and whose CPE purchases raise the competitive concerns identified by petitioners in this proceeding.

[76] The costs of such notification should be assigned to AT&T's unregulated operations.

[77] *See AT&T Structural Relief Order*, 102 FCC 2d at 697-699, paras. 75-78.

[78] Separation of the Costs of Regulated Telephone Service From Costs of Nonregulated Activities, and the Amendment of Part 31, the Uniform, System of Accounts for Class A and Class B Telephone Companies, to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and Their Affiliates, *Notice of Proposed Rulemaking*, CC Docket No. 86-111, FCC No. 86-146 (released April 17, 1986) (*Joint Cost Notice*).

ing plan filed by AT&T in response to the *AT&T Structural Relief Order*, the Bureau will, of course, consider that pleading in its review of that plan.

E. Review of the AT&T Compliance Plans

55. To implement the accounting, nondiscrimination, and CPNI safeguards we established in the *AT&T Structural Relief Order*, we required AT&T to file plans describing its compliance with those safeguards. We directed that those plans be subject to (a) an initial review by the Bureau, prior to the implementation of structural relief, to ensure that the plans met the concerns expressed in the *AT&T Structural Relief Order*, and (b) a subsequent, detailed review after interested parties were provided an opportunity for comment. A number of parties in this proceeding disagree with our decision not to allow public comment on AT&T's compliance plans prior to the implementation of structural relief. We have already addressed the merits of these arguments and approved the bifurcated review procedures we established in the *AT&T Structural Relief Order* in our denial of a Petition for Stay filed by IDCMA.[79] Following our denial of this petition, the Bureau completed its initial review of the AT&T Plans and permitted AT&T to implement structural relief.[80] Furthermore, we have asked for public comment on AT&T Plans; and based on its review of that record, the Bureau has issued its order approving most aspects of, but ordering some changes in, the nondiscrimination and CPNI plans. In these circumstances, we do not believe there are additional benefits to be gained from addressing this issue further in this proceeding.

F. Duty of "Fair Dealing and Cooperation"

56. IDCMA argues that a basic principle underlying much of the analysis in the *AT&T Structural Relief Order* is a duty on the part of AT&T to cooperate and deal fairly with its CPE competitors. IDCMA contends that this duty should be made explicit, in effect an additional nonstructural safeguard. IDCMA argues that such a duty of "fair dealing and cooperation" is very similar, if not identical, to the "just and reasonable" standard of

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[79] *See* Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Company, *Order*, CC Docket 85-26, FCC 85-615 (released Dec. 2, 1985).

[80] *See* Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Company, *Order*, CC Docket 85-26, Mimeo No. 1143 (released Nov. 27, 1985).

the Communications Act. IDCMA further suggests that AT&T should be required to notify each of its network services customers and all of its employees of this basic duty and of the specific safeguards that implement it.[81]

57. We agree with IDCMA that AT&T should be required to deal fairly and cooperatively with all its customers, including those that are its CPE competitors. We also agree with IDCMA that such a duty is embodied in the spirit, if not the specific language, of the Communications Act, as well as in the standards we established in the *AT&T Structural Relief Order*. However, we are unable to perceive what benefits are to be gained from imposing another "standard" on AT&T, which we may be subsequently be required to interpret,[82] when the time-honored principles of the Communications Act will serve the same purpose. Furthermore, except as we have previously noted,[83] we decline to adopt specific rules requiring AT&T to provide notice to its employees and customers concerning the requirements of the *AT&T Structural Relief Order*. It is in AT&T's own best interest to see that its employees are notified of the rules they are required to follow, for violation of those rules could subject AT&T to a range of sanctions. As to AT&T's network services customers, we have already indicated that they should be advised of certain of our rules, and we have required AT&T to undertake such notification.

G. Joint Testing

58. In its accounting plan, AT&T states that it intends to allow its CPE and network services technicians to provide joint installation and maintenance services for AT&T's CPE and transmission circuits.[84] IDCMA recommends that the Commission require AT&T to limit its joint testing service to its network services personnel, to offer the service only under tariff, and to

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[81] Although IDCMA also requests that we prohibit AT&T from terminating a customer's basic service if the customer defaults on its CPE payments (IDCMA Preliminary Plan Comments at 30), AT&T's tariffs do not currently allow it to engage in that practice. Therefore, we decline to address this issue unless and until AT&T's files revisions to its tariffs that include such provisions.

[82] Establishing a separate standard would, of course, create the basis for an argument that we intended to establish some further requirement or limitation on AT&T's activities beyond those set out in the *AT&T Structural Relief Order* and this Order, since otherwise there would be no need for the additional standard. If this is IDCMA's intent, it has not indicated what the content of such an additional standard would be or why it is necessary.

[83] *See supra* para. 53.

[84] AT&T 85-26 Accounting Plans at 13 and 31.

make the service available for the testing of independently supplied CPE.[85] NATA suggests that the Commission require AT&T to coordinate this joint testing service with independent interconnect vendors.[86]

59. We view AT&T's proposed joint testing of its circuit configurations and CPE to be an efficient by-product of the structural relief mandated by the *AT&T Structural Relief Order*. Therefore, we decline to adopt the recommendation that AT&T's joint testing service be subject to a modified form of structural separation or that it be required to be offered under tariff. We believe, however, that pursuant to the nondiscrimination guidelines established in the *AT&T Structural Relief Order*, if AT&T offers joint testing, it must coordinate with independent CPE vendors. Specifically, if AT&T engages in joint testing of newly installed basic service for its own CPE customers, then AT&T must also provide interconnect vendors with the opportunity to test their CPE jointly with AT&T's newly installed basic service. Similarly, if AT&T jointly tests its network services and CPE for maintenance purposes, it must provide interconnect vendors an equivalent opportunity to test their CPE. Although we allow AT&T to determine the details of this coordination, the procedures it develops must provide an opportunity for independent CPE vendors to coordinate testing that is comparable to that provided to AT&T's CPE personnel.

V. Ordering Clause

60. Accordingly, IT IS HEREBY ORDERED, That pursuant to 47 U.S.C. 154(i) and (j), 201, 202, 203, 205, 218, and 403, and 5 U.S.C. 553 the Petitions for Reconsideration filed in this proceeding, ARE DENIED except as provided herein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appendix A

The following parties filed petitions seeking reconsideration of various aspects of the *AT&T Structural Relief Order*:

Communications Workers of America (CWA)
CBEMA

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[85] IDCMA Preliminary Plan Comments at 29.

[86] NATA Plan Comments at 23–25; NATA Reconsideration Comments at 11–13.

Computer and Communications Industry Association (CCIA)

Digital Equipment Corporation (Digital)

GTE

IDCMA

International Business Machines Corporation (IBMA)

International Communications Association (ICA)

Northern Telecom, Inc. (Northern Telecom)

The following parties filed oppositions to, or comments on, the above petitions for reconsideration:

AT&T

BellSouth

NATA

The following parties filed replies to the above oppositions:

CBEMA

CCIA

Digital

NATA

Northern Telecom

Private Line Service
Reconsideration

Petitions for reconsideration of the Commission's action on May 28, 1985 permitting AT&T's restructured private line tariffs to take effect are denied.
—*AT&T Communications*
CC Docket No. 85-400

FCC 86-273

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AT&T Communications	**Transmittal Nos. 285, 318, 342 and 346**
Tariff F.C.C. Nos. 9, 10, and 11	**CC Docket No. 85-400**

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: May 29, 1986; Released: June 5, 1986

BY THE COMMISSION:

1. On April 26, 1985, the Commission determined that the revised private line rate structure proposed by American Telephone and Telegraph Company (AT&T) as Tariff F.C.C. Nos. 9, 10 and 11 should not be rejected or suspended and permitted it to take effect, subject to several reporting conditions and subsequent investigation of remaining issues.[1] AT&T Communications (Tariff F.C.C. Nos. 9, 10, and 11), FCC 85-221, released May. 28, 1985 (*May 28 Order*). Now before the Commission are petitions for reconsideration of that decision submitted by Western Union Telegraph Company (Western Union) and jointly by several television service customers, styled the "User Parties."[2] In

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[1] The investigation of remaining issues, under CC Docket No. 85-400, was initiated by separate Order. Investigation of AT&T Communications Tariff F.C.C. Nos. 9, 10 and 11, CC Docket No. 85-400, Order Designating Issues for Investigation, F.C.C. No. 1790, released Jan. 7, 1986 (*Designation Order*).

[2] The "User Parties" are American Broadcasting Companies, Inc., CBS, Inc.,

addition, AT&T has requested clarification of one aspect of the Order.[3] For the reasons stated in more detail below, we have determined that the petitions raise no new facts or changed circumstances warranting reconsideration; AT&T's request for clarification has been answered.

2. Because the two petitions and the clarification request each raise distinct issues, we treat them separately below. In brief, Western Union asserts this Commission erred by failing to require that AT&T recover the cost of intermachine facilities, used between its offices to provide switched private line service, through the application of a discrete rate element or other pricing mechanism that would mitigate the burdens faced by carriers with less ubiquitous facility networks than AT&T. The User Parties contend that this Commission erred by determining that, apart from issues explicitly reserved for further investigation by the *May 28 Order*, AT&T's proposed television rates and rate structure satisfy applicable Commission standards for review. AT&T, for its part, seeks clarification of Commission instructions for implementing the special access phase — in for Other Common Carriers (OCCs), and of the formulae set out in the *May 28 Order* for the computation of refunds possibly owed the OCCs if AT&T's revised rates exceed those that would have been imposed under the Docket No. 20099 Settlement Agreement.[4]

National Broadcasting Company, Inc., the Association of Independent Television Stations, Inc., the Hughes Television Network and the National Association of Broadcasters.

MCI Telecommunications Corporation submitted a petition for reconsideration on June 28, 1985, after the expiration of the 30-day filing period set forth in Section 405 of the Communications Act, 47 U.S.C. § 405. As the Act does not provide the Commission authority to waive that requirement, MCI's petition must be dismissed as untimely. *See* Authorized User Policy, FCC 85-823, released June 28, 1985 at para. 11 n.11.

On January 10, 1986, Western Union filed a Motion for Expeditious Decision and Application for Review, seeking to expedite Commission consideration of its petition for reconsideration of the *May 28 Order* and urging the Commission to review the Bureau's *Designation Order, supra* n. 1, to the extent that it failed to designate for investigation the issue of AT&T's rates for intermachine facilities. The *Designation Order* essentially specifies in greater detail matters determined to warrant investigation in the *May 28 Order*. We have reviewed the Bureau's *Designation Order* in light of Western Union's application; however, because that Order is consistent with the Commission's original *May 28 Order*, upheld by today's action, our denial of Western Union's petition for reconsideration in the instant Order moots its Application for Review.

[3] MCI alone opposed AT&T's petition for clarification; AT&T responded to each of the several petitions for reconsideration.

[4] The rates for facilities provided to OCCs by the Bell Operating Companies (BOCs) were established by a Settlement Agreement accepted by the Commis-

DISCUSSION

3. Western Union. Western Union contends that the Commission improperly refused to investigate AT&T's rates for intermachine facilities. Western Union asserts that no separate local charge is imposed under the AT&T structure to recover the cost of connecting an AT&T trunk to an AT&T switching machine providing CCSA, EPSCS, or SCAN services, while OCCs offering such transmission between AT&T switching machines often incur such a charge in the form of special access charges. This, Western Union contends, unreasonably impedes the OCCs' competitive provision of such services. Western Union asserts that AT&T should recover the cost of facilities used to connect its trunks with switching machines, whether or not the AT&T serving office (central office) is located with the switch, through a separate rate element.

4. Western Union's contention, together with similar proposals by several other carriers, was discussed at some length in the *May 28 Order* (paras. 42-49). Reduced to essentials, the varied OCC proposals sought to have the Commission prescribe an AT&T rate methodology for these services that would mitigate the operating efficiencies and consequent cost advantages evidently inherent in AT&T's more ubiquitous facility network. In general terms, the common element of these proposals was a requirement that the costs of selected aspects of AT&T's network be averaged for ratemaking purposes with comparable components that OCC providers obtain from LECs under special access tariffs. The Commission stated in the *May 28 Order* at para. 46 that the revisions urged by Western Union and others, requiring AT&T to average its network costs with the special access charges incurred by competitors, would "work directly against the underlying purposes of both Commission policy and the [Modified Final Judgment approved in the Bell System divestiture proceeding], by establishing an access pool administered by the dominant interexchange carrier." A related approach, requiring that AT&T break out a separate charge for local channels that it often does not need to obtain separately in order to provide service, was not adopted because it potentially created discriminatory pricing for some AT&T customers (by applying a rate element to their circuits in the absence of an underlying functional component),

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sion as a disposition of Docket No. 20099. *See* American Telephone and Telegraph Company, 47 FCC 2d 660 (1974), 52 FCC 2d 727 (1975), *aff'd sub nom.* Carpenter v FCC, 539 F .2d 242 (D.C. Cir. 1976).

and in any case would have benefited AT&T's competitors generally at the expense of the dominant carrier's ratepayers.

5. Western Union's petition adds no new facts or changed circumstances to the various OCC contentions examined in the *May 28 Order*; it simply reiterates alternative ratemaking arguments that do not warrant consideration in a Commission investigation. We have already noted that these proposals would distort the accurate reflection of the carriers' different costs in their rate structures, with "little assurance of improved consumer welfare in either the short or long run." *May 28 Order* at para. 49. Accordingly, the petition will be denied.

6. User Parties. The User Parties contend this Commission erred by accepting the proposition that the Interim Cost Allocation Manual (ICAM) relieves the carrier of its obligation to justify individual tariff filings' rates. They assert that we have accepted the ICAM as support "in and of itself" for rates proposed for individual private line services using identifiable, dedicated facilities—even though the ICAM does not in fact assign costs to individual private line services, and Commission Orders establishing the ICAM require that AT&T independently justify individual tariff filings. Specifically, the User Parties contend that (i) the Private Line Cost System (PLCS) was accepted without support necessary to establish its compliance with Commission directives in CC Docket No. 81-351;[5] (ii) the allocation of broadband microwave and station connection investment to television service reflects outdated (1978) relative use data; (iii) AT&T's revenues from its rate increase in Transmittal No. 318 were not properly reflected in its forecasted return; and (iv) the AT&T rates are predicated on overstated and unapproved claims for increased depreciation expense.[6]

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[5] American Telephone and Telegraph Co. (Revisions to Tariff F.C.C. Nos. 258 and 260, and Establishment of Tariff F.C.C. No. 269: Series 7000 Terrestrial Television Transmission Services), CC Docket No. 81-351, 88 FCC 2d 1656 (1982).

[6] The User Parties also contend that the existence of the pending investigation of the LECs' rate structure for their video service (CC Docket No. 85-166) requires that AT&T delay modification of its own local channel rate structure under Tariff No. 11, to comport with the LECs' serving wire center pricing regime, until that investigation is resolved. The rate structure provisions required by the *May 28 Order*, however, and since permitted to take effect January 11, 1986, are important to facilitate comparison of AT&T offerings with the underlying LEC offerings, and incidentally to avoid a recurrence of the situation described in the *May 28 Order* at para. 50, that resulted in AT&T buffering underlying LEC rates for its customers.

By allowing AT&T's Tariff No. 11 restructure to take effect, the Common

7. At the outset, we reject any suggestion that our decision to permit these tariffs to become effective without suspension represents a departure from this Commission's recent approach to ICAM methodology. The User Parties accurately state that the ICAM was intended to safeguard MTS customers from the burden of subsidizing private line services, rather than as a mechanism to distribute investment and expense between individual private line services.[7] To recognize this point, however, is not to accept their further characterization of Commission action in the *May 28 Order* as an unexplained departure from these precepts.

8. *PLCS Methodology*. As stated in the *May 28 Order*, AT&T relied in preparing its cost support on the Private Line Cost System (PLCS) methodology, which, while based on ICAM principles, is an independent cost support methodology. The use of PLCS does not constitute Commission acceptance of ICAM methodology as a replacement of cost support for individual service filings, as asserted by the User Parties; indeed, the *May 28 Order* (at para. 87) expressed our concern that PLCS be more explicitly linked to the specific Commission directives in CC Docket No. 81-351, and the investigation Order iterates that concern. However, the explanation of PLCS contained in AT&T Tariff Filing Practice (TFP) 1525, which the User Parties do not even address in their petition, generally establishes that this cost support methodology for the allocation of costs to individual private line services is sufficiently plausible to justify accepting tariffs without suspension. PLCS has, in fact, been used by AT&T since the June 1982 filing of Terrestrial Digital Circuits as its primary private line cost support methodology, and the User Parties fail to cite any authority suggesting the unreasonableness of this methodology to achieve the full distribution of private line

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Carrier Bureau implicitly denied this argument, and properly so. Apart from the denial of the carrier's opportunity to earn a reasonable return, for the Bureau to have postponed or otherwise mitigated the effect of the Tariff No. 11 restructure for television services would have more directly prejudiced the special access investigation, by instructing AT&T to accord television customers preferential rate treatment — a course at odds with both the underlying LEC structure and its impartial application to all private line services *pendente lite.* In any case, the first phase of the special access investigation has recently been concluded, and the television customers' arguments were denied. Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, FCC 86-52, released Jan. 24, 1986.

[7] Manual and Procedures for the Allocation of Costs, Notice of Proposed Rulemaking, 78 FCC 2d 1296, 1298 (1980); Report and Order, 84 FCC 2d 384 (1981); *reconsideration denied,* 86 FCC 667 (1981); *aff'd sub nom.* MCI Telecommunications Corp. v FCC, 675 F .2d 408 (D.C. Cir. 1982).

category costs to the several services. The investigation of the private line rate structure will, as stated in the Order designating issues, examine this methodology's compliance with the requirements stated in CC Docket 81-351.[8]

9. The User Parties also contend that a departure from the requirement that individual services be cost supported is shown by the statement in the *May 28 Order* that divergent demand projections — a source of contention not renewed here — did appreciably affect the reasonableness of the carrier's estimates, once the "ICAM is accepted as the proper methodology for allocation of investment to particular private line services." *May 28 Order* at para. 85. The quoted passage, however, is taken from our discussion of several television users' refusal to accept the broad implications of ICAM methodology generally for the allocation of costs to individual private line services. The same paragraph earlier notes this Commission's determination in previous television proceedings that AT&T had allocated costs to television service "in accordance with the January 1981 ICAM." These statements, when read in context, simply iterate the determination that AT&T had complied with the implications of ICAM in its allocation of costs to individual services, whether by an incomplete version of PLCS in the earlier context, or by its use as established methodology in the present proceeding. The discussion in the *May 28 Order* cannot be taken to mean that we view compliance with ICAM as sufficient support for rates for individual private line services.

10. *1978 Relative Use Data.* The User Parties' contention that some investment allocated to television service reflects outdated relative use data simply repeats arguments considered in the *May 28 Order* at paras. 84-85. Investment for television was reasonably grounded in projected 1985 demand and investment data, reflecting in the main the assignment of non-service-specific (*i.e.,* "multiservice") plant on a relative use basis, rather than by the direct assignment regime that was unsuccessfully advocated in CC Docket No. 81-351.[9] There are no changed circumstances or new facts warranting reconsideration.

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[8] Order Designating Issues, *supra* n. 1, at para. 24. Even the ultimate demonstration of deficiencies in the use of PLC methodology to implement our instructions in Docket No. 81-351 would not establish the contention argued by the User Parties.

[9] Had AT&T in fact relied on 1978 data for the allocation of multiservice plant investment to the television service, we would be concerned that an otherwise generally sound PLCS methodology had been applied to obsolete data.

11. *Tr. 318 Revenues' Effect on Return.* The User Parties also assert that AT&T revenue and demand projections associated with rate increases for the television service provided in Transmittal No. 318 operate to understate the return for television service. In effect, the User Parties contend that although service revenues will increase, due to the combination of upwardly revised demand estimates and Tr. 318 rate revisions, the incremental expense incurred to meet the greater demand for service will not bear the same relation to resulting revenues as do the expenses necessary to generate the baseline revenues originally proposed in Tr. 285. In effect, this argument simply recasts the User Parties' central contention — that the costs allocated to provision of television service should be reallocated on a service-specific, marginal basis rather than the PLCS methodology. No basis is offered, however, from which to infer that the relation between expenses incurred by AT&T to provide television service, and the revenues generated by the service, vary as a function of the demand increments urged by User Parties in commenting on Tr. 285, and subsequently accepted by AT&T. Further, as AT&T provided an interim report on actual television demand pursuant to Commission direction on August 23, 1985, and the subsequent Order designating issues for investigation more precisely specified that revenue impacts of actual television demand be provided as well, we will be able to review actual operating experience for the television service in this respect. There is thus no occasion to revisit the May 28 Order for this purpose.

12. *Depreciation Expense.* Users contend that AT&T's support for its projected depreciation expense — a May 11, 1984 petition unresolved when Tariff Nos. 9, 10 and 11 were submitted — was inadequate, and that the Commission failed to address their arguments in this respect in the *May 28 Order*. Then, as now, these arguments are premature: while this Commission could, for example, seek to determine the effect on private line rates of its Order prescribing revised depreciation rates for AT&T Communications' interstate division,[10] and the subsequent order prescribing depreciation rates for twenty-two interexchange subsidiaries,[11] reconsideration of those Orders is pending. We will

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[10] Prescription of Revised Depreciation Rates for AT&T Communications — Interstate Division, 101 FCC 2d 137 (1985).

[11] In the Matter of the Prescription of Revised Depreciation Rates for AT&T Communications of California Inc., AT&T Communications of Delaware, Inc., AT&T Communications of Maryland, Inc., AT&T Communications of Michigan, Inc., AT&T Communications of the Midwest, Inc., AT&T Communications of the Mountain States, Inc., AT&T Communications of Nevada, Inc., AT&T

await resolution of these matters before seeking to determine the overall effect of depreciation changes on private line rates.[12]

13. AT&T Clarification Request. AT&T makes two contentions. First, it asserts that the refund calculation formula set forth in Attachment C to the *May 28 Order* is not wholly consistent with the summary explanation of the refund obligation contained in note 23 of the text, and that in any case neither expression fully serves the Commission's purpose, so that a refinement AT&T proposes is appropriate. Second, AT&T urges that it be permitted to recover expenses incurred as part of its provision of special access service at phased-in rates to OCCs. MCI opposes both elements of AT&T's petition, contending that AT&T "in reality" seeks reversal of the *May 28 Order* respecting refund calculations, and that incidental expenses associated with special access provided OCCs by AT&T "should be minimal or nonexistent."

14. *Formula.* With respect to the refund formulae used to determine instances in which AT&T's revised rate structure results in higher aggregate charges to OCCs than would have been assessed by BOCs providing facilities subject to the Docket No. 20099 Settlement Agreement, it must be borne in mind that the pre-divestiture BOC tariffs, because generally modeled after AT&T's own pre-divestiture rate structure, do not resemble the present AT&T structure. Nor were the BOC tariffs entirely consistent. The dissimilar rate structures originally involved in the several BOC facilities tariffs applying Docket No. 20099-based rates, and the new structure established by Tariff No. 9, thus preclude a straightforward (element by element) comparison and require development of a surrogate formula recognizing these rate structure differences on a reasonable basis. AT&T states that the cited portions of the *May 28 Order* establish conflicting surrogate methods for calculating rates OCCs would have paid under the Docket No. 20099 Settlement Agreement for "local distribution" circuits now obtained under Tariff No. 9, and thus for determining

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Communications of New England, Inc., AT&T Communications of New Jersey, Inc., AT&T Communications of New York, Inc., AT&T Communications of Ohio, Inc., AT&T Communications of the Pacific Northwest, Inc., AT&T Communications of Pennsylvania, Inc., AT&T Communications of the South Central States, Inc., AT&T Communications of the Southern States, Inc., AT&T Communications of the Southwest, Inc., AT&T Communications of Virginia, Inc., AT&T Communications of Washington, D.C., Inc., AT&T Communications of West Virginia, AT&T Communications of Wisconsin, Inc., FCC 85-568, released October 23, 1985.

[12] As the private line offerings of AT&T remain subject to accounting requirements pending that investigation, and final depreciation decisions requiring adjustment could be implemented without difficulty.

whether the rates applied under Tariff No. 9 represent an excess over the Docket No. 20099 rates, which were tariffed under a quite different rate structure. Under the terms of the *May 28 Order*, if such excesses represent the aggregate of circuits used by an OCC, they must be refunded.

15. The Commission's intent, which it believed was stated clearly in Attachment C to the *May 28 Order* was that AT&T first separate special access components and associated charges from current end-to-end circuits, in order both to identify the circuit portion provided under Tariff No. 9 and to recognize the previous determination that rates for the intraLATA segments established pursuant to the Docket No. 20099 process were unlawful. The special access segments were thus removed from the scope of the Docket No. 20099 Settlement Agreement by the Commission's determination that Docket No. 20099-based rates were unlawful, as noted in the *May 28 Order* at para. 19. The rate comparison could then be made between, on the one hand, the charges that would presently apply under Tariff No. 9 to the actual interLATA segment connecting AT&T central offices (including Central Office Connection functions) and, on the other hand, charges that would have for this same segment, both based on the air mileage between AT&T central offices. We recognize the inherent imperfections of any such comparison drawn from two dissimilar rate structures, but consider the procedure established in Attachment C a reasonable approach. Because AT&T has already submitted a tentative refund calculation that comports with the Attachment C methodology, and that demonstrates the modest level of the refund amounts involved, we need not consider whether its suggested refinement is necessary or desirable.[13]

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[13] In order to prepare initial calculations of its possible refund obligations, AT&T sought informal guidance from Commission staff on its interpretation of Attachment C. The tentative calculation of refund obligations was submitted December 3, 1985, together with an explanation of the remaining accounts not yet calculated, and the difficulties encountered by AT&T in obtaining information from local exchange carriers sufficient to enable the pass-through of discounted special access charges. We have examined the general methodology employed by AT&T in preparing these calculations and find it comports with our instructions of May 28. The further consideration of these matters, including the furnishing by LECs of the remaining information needed by AT&T to provide pass-through of transitional special access discounts, will be handled by the Common Carrier Bureau consistent with our general delegation of authority in the *May 28 Order*.

AT&T has subsequently increased its Tariff No. 11 rates by approximately 19 percent. Tr. 504, n.6, *supra*. As AT&T's estimated 1985 return for the

16. MCI's opposition, in contrast, argues from note 23 of the *May 28 Order* that the Commission intended the Docket No. 20099-equivalent charge for Tariff No. 9 channels be determined by deducting special access charges from the total Docket No. 20099-based end-to-end charge. MCI Opposition at paras. 4-5. This approach however, would juxtapose an averaged end-to-end rate element imposed by the prior rate structure with a single component of the more granular and bifurcated post-divestiture rate structure — a structure necessarily bifurcated to reflect new ownership relations, and one that has allowed the Commission's earlier determination of unlawfulness regarding Docket No. 20099-based intraLATA rates to stand separately from the question of AT&T's rates and structure. MCI's approach thus holds clear potential for unreasonable results. It would subtract the "special access portion" from a rate structure that recognizes no such separate component; more fundamentally, subtracting special access charges from an end-to-end Docket No. 20099 rate effectively revives that regime's application to BOC circuits, in contradiction of past Commission decisions. Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part I, FCC 84-524, released Nov. 9, 1984, paras. 99-100, 103-104. Because the special access rates that have replaced unlawfully low Docket No. 20099 rates for LEC circuits are substantially greater, the practical consequence of MCI's proposal would often be a refund substantially biased upward by comparison of Tariff No. 9 rates with a residual Docket No. 20099 IXC rate component that is artificially depressed by the subtraction of special access charges developed for a subsequent rate structure. Indeed, whenever the combined special access charges exceed the former end-to-end Docket No. 20099 rate — most probably in the shorter-haul circuits used to fill gaps in OCC facility networks — the entire Tariff No. 9 rate for the circuit between AT&T offices would be determined "excessive" under MCI's approach. This is a clearly irrational result.[14]

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private line category of between 0 and 2 percent appears primarily attributable to earnings shortfalls for local channel service, the impact of MCI's approach would be even broader if it were applied to Tariff No. 11 rates that more accurately recognize underlying special access charges.

[14] AT&T asks that we remove the formula in Attachment C for calculating rates for circuits placed in service after November 8, 1984, noting that such circuits entail no transitional special access discount. The formula, however, explicitly recognizes this by its use of the "SA" term where the formula directed to transitional access circuits employs the "SAt" term, reflecting the presence of a transition discount. The formula was provided to clarify the procedure for

17. In addition, and contrary to MCI's assertions, the text of the *May 28 Order* does "mention" Attachment C; note 18 states that the methodology for the required adjustments is set forth in Attachment C. Contrary to MCI's assertions, the formulae contained in that attachment (equations (4) and (5)) make clear that the special access element has been subtracted for purposes of comparison: the IXC term is defined in Attachment C as measured between AT&T central offices, which are not connected by LEC facilities. Finally, as AT&T notes, the phase-in of special access rates and AT&T's concomitant pass-through obligations do not apply to facilities formerly provided under AT&T Tariff No. 266, because those facilities were never provided at a discount to OCC customers.

18. *Expenses.* AT&T contends that the Attachment C formulae fail to provide for application of discrete tariffed charges associated with special access provided by AT&T under Tariff No. 11, which arise from expenses incurred by AT&T above and beyond the BOCs' special access charges. AT&T asserts that requiring it to apply only the underlying BOC tariff charges would effectively exempt OCCs from compensating AT&T for these additional maintenance, administration and billing expenses. MCI asserts that AT&T has failed to justify imposition of such administrative charges, stating that administrative costs should be minimal for existing arrangements, that coordination and maintenance costs should be "non-existent" and that billing costs are "probably recovered" through Tariff No. 9 charges.

19. It is clear that certain coordination functions necessarily arise from the bifurcation of the pre-divestiture entity, as noted in our *May 28 Order*. There are both new functions, such as the continuing operational coordination between separate entities, and the more explicit recognition of functions that formerly could have been recovered under any of several rate elements. The access coordination function, in particular, was subsumed in the prior end-to-end arrangements but must now be separately priced and recovered, both to reflect the division of operational responsibilities and to enable customers to assess the alternative costs and benefits of assembling circuit components themselves. It appears evident, therefore, that AT&T is entitled to recover costs it incurs when obtaining BOC-provided facilities destined to be offered under Tariff F.C.C. No. 11, and that provision of the

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circuits involving multiple special access components placed in service at different times; as it properly reflects the existing rate elements, there is no cause to delete it.

access coordination function does not inherently warrant different treatment of AT&T costs incurred in the provision of these services solely as a function of their status as transitional circuits or more recently ordered arrangements.[15]

20. That AT&T is entitled to recoup such coordination costs in principle, however, does not resolve the question whether the costs actually incurred in the continued provision of the instant pre-November 8 circuits, and those incurred in the provision of all remaining circuits (including those placed in service after that date), vary significantly. Accordingly, we will determine in the private line investigation, CC Docket No. 85-400, the extent to which these costs differ, and whether a different allowance for such costs should be made for transitional special access circuits.

ORDERING CLAUSES

21. For the reasons stated above, the petitions for reconsideration submitted by Western Union Telegraph Company and jointly by American Broadcasting Companies, Inc., CBS, Inc., National Broadcasting Company, Inc., The Association of Independent Television Stations, Inc., the Hughes Television Network, and the National Association of Broadcasters, ARE DENIED.

22. For the reasons stated in footnote 2, the Application for Review of the Order released January 7, 1986 (Mimeo No. 1790), filed by Western Union Telegraph Company, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[15] The rates for facilities provided to OCCs by the Bell Operating Companies (BOCs) were established by a Settlement Agreement accepted by the Commission as a disposition of Docket No. 20099. *See* American Telephone and Telegraph Company, 47 FCC 2d 660 (1974), 52 FCC 2d 727 (1975), *aff'd sub nom.* Carpenter v FCC, 539 F.2d 242 (D.C. Cir. 1976).

Comparative Criteria

No diversification preference awarded for local weekly newspaper interest because circulation was small and other local newspaper were present. Divestiture pledge, made in integration statement, was timely because application no longer calls for reporting of weekly newspaper interests.
—*Barton B/cing Co.*
MM Docket No. 84-728

FCC 86R-31

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Ernest F. and Manuela M. Barton d/b/a BARTON BROADCASTING COMPANY Lubbock, Texas	MM Docket No 84-728 File No. BPH-831027AL
Frankie Paul Rodriquez & Hortencia Lilia Rodriquez d/b/a FHT BROADCASTING Lubbock, Texas	MM Docket No. 84-729 File No. BPH-831027AM
For Construction Permit for a New FM Station	

Appearances

Thomas L. Root, on behalf of Ernest F. and Manuela M. Barton, d/b/a Barton Broadcasting Company; and *Lee J. Peltzman* and *Barbara M. Barron*, on behalf of Frankie Paul Rodriquez and Hortencia Lilia Rodriquez d/b/a FHT Broadcasting.

DECISION

Adopted: May 12, 1986; Released: May 15, 1986

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS AND ESBENSEN.

BOARD CHAIRMAN MARINO:

1. In this comparative contest to select a permittee for a new FM broadcast station to operate on Channel 292A at Lubbock, Texas, Administrative Law Judge Chachkin (ALJ) granted the application of Ernest F. and Manuela M. Barton d/b/a Barton Broadcasting Company (Barton). *Initial Decision* (*I.D.*), FCC 85D-68, released October 23, 1985. The judge held that Barton was entitled to a moderate to substantial integration of ownership and management preference which outweighed a slight diversification of control and a very slight comparative coverage preference awarded its opponent, Frankie Paul Rodriquez and Hortencia Lilia Rodriquez d/b/a FHT Broadcasting (FHT). *Id.* at para. 40. The proceeding is now before the Review Board on exceptions filed by FHT and limited exceptions filed by Barton.[1] We have reviewed the *I.D.* in light of the exceptions and reply briefs and the record. Except as modified below, the ALJ's findings of fact are adopted and his ultimate conclusion that Barton is the best qualified applicant is affirmed. As explained below, however, we have revised key elements of the ALJ's analysis in accordance with recent Board and Commission comparative case law.

2. *Diversification of Control.* The only attributable media interest of either applicant, according to the ALJ, is the *West Texas Hispanic News*, a weekly newspaper published in Lubbock and solely owned by Ernest F. Barton, a 49% partner in Barton. Approximately 5,000 copies of the newspaper are given away each week at places such as grocery stores. The newspaper focuses on items of interest to the Mexican-American community. Lubbock has three other newspapers including two weeklies and one daily. *I.D.*, paras. 5-6. Mr. Barton pledged to divest his interest in the newspaper but because his commitment was made after the B cut-off date in his integration statement, the ALJ did not credit it. The ALJ awarded FHT a slight diversification preference over Barton on the basis of these facts. *I.D.*, paras. 7, 35. In their respective exceptions, FHT argues that its preference should be elevated to a moderate one whereas Barton contends that its divestiture commitment should be honored and the demerit assessed against it removed.

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[1] Oral argument, which was requested by Barton and opposed by FHT, was not held because the *I.D.* and appellate briefs present the issues in a concise and straightforward manner not requiring further elaboration in oral presentation.

3. With regard, first, to the weight to be given Barton's newspaper ownership, we believe this interest is essentially *de minimis* — that is, it does not have any meaningful adverse impact on the Commission's diversification policies. FHT's claim that it is entitled to a moderate preference because of Barton's newspaper holding is not supported by a single case citation, let alone one where comparable facts were present and the demerit assigned was a meaningful one. In fact, the Commission, while it will consider a non-daily circulation newspaper as a diversification factor, normally will give little weight to such interests. *See, e.g.*, Cannon's Point Broadcasting Co., 93 FCC 2d 643, 648 (Rev. Bd.), *recon. denied*, FCC 83R-38, released May 13, 1983; *rev. denied*, FCC 84-161, released April 13, 1984 (subsequent history omitted) (minority stockholder's ownership of a weekly newspaper in nearby community deemed marginal and *de minimis* — no preference awarded); *Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (Rev. Bd.), *recon. denied*, 52 RR 2d 1357 (Rev. Bd. 1982), *modified*, FCC 84-72, released March 15, 1984 (limited partner's ownership of local monthly magazine "would not adversely affect local diversification of mass media"); *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526 (Rev. Bd. 1976) (weekly newspaper with small local distribution not a significant factor); *The News-Sun Broadcasting Co.*, 24 FCC 2d 770, 776 n. 14 (Rev. Bd. 1970), *rev. denied*, 27 FCC 2d 61 (1971) (weekly newspaper interest "cannot be simply dismissed as having no significance whatsoever"). The cases relied on by the ALJ — *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506 (Rev. Bd. 1982), and *Caldwell Broadcasting Corp.*, 57 RR 2d 1039 (Rev. Bd. 1985) — also do not persuade us that a demerit of any consequence is called for. In *Merrimack*, only a very slight demerit was assigned for ownership of a weekly newspaper with a circulation of 14,000, and in *Caldwell*, a slight preference was given based on ownership of a major regional monthly magazine with an in-state circulation of 280,000 and a service area circulation of 30,000. Here, by contrast, a total of 5,000 copies of the *West Texas Hispanic News* are given away in Lubbock, a community of over 174,000 persons (*I.D.*, at para. 3); the newspaper is of a specialized nature; and it is one of three weeklies in a community which has a daily newspaper of general circulation. Under these circumstances, we believe no preference of any appreciable size is warranted. *Cf. Greater Wichita Telecasting, Inc.*, FCC 84-72, *supra*, at para. 6 (presence of other media including large circulation daily newspaper in community reduces interest in monthly publication to one of "extremely minor

significance"). In any event, as will appear below, we also hold that Mr. Barton's proposed divestiture of his newspaper holding was timely announced in accordance with recent Board and Commission precedent.

4. Traditional Commission policy has barred an applicant from seeking to improve or upgrade its comparative posture after the cut-off date freezing comparative proposals. For most purposes, under the old version of FCC Form 301, this has been the "B" cut-off date for amendments as of right. *See Alexander S. Klein*, 86 FCC 2d 423, 434 (1981), and cases cited therein. In *Northland Communications*, 100 FCC 2d 914 (Rev. Bd. 1985), *rev. denied*, FCC 86-106, released March 14, 1986, however, a case in which the applicants used the revised version of FCC Form 301, the Board credited an applicant's originally contingent integration commitment because the contingency was removed prior to the exhibit exchange date when the ALJ required complete integration proposals to be set forth. This became the pertinent cut-off date for freezing comparative positions in that case because the revised version of FCC Form 301 deleted all questions concerning integration proposals. *Id.* at 916-918. Likewise, in *Metro Broadcasting, Inc.*, 99 FCC 2d 688, 704-05 (Rev. Bd. 1984), *rev. denied*, FCC 85-558, released October 18, 1985, the Board had earlier applied the same reasoning to auxiliary power proposals and held that since the application form no longer requests auxiliary power information, an applicant could timely file its proposal as part of its direct case. The Board's reasoning in this area was recently expressly approved by the Commission in *Women's Broadcasting Coalition, Inc.*, FCC 85-667, released January 3, 1986, at para. 4, *modifying Santee Cooper Broadcasting Co.,* 99 FCC 2d 781 (Rev. Bd. 1984), *recon. denied*, 100 FCC 2d 469 (Rev. Bd. 1985).

5. It follows from these cases that the same result should obtain with respect to Barton's proposed divestiture of his weekly newspaper ownership. This is so because, apart from other broadcast interests, the application form now only requires the reporting of an applicant's interests in a *daily* newspaper or cable television system. FCC Form 301, Item 5 (b). Thus, we do not consider Barton's divestiture pledge to be untimely and in conflict with the general prohibition against upgrading because it was made on the relevant cut-off date for fixing comparative proposals in this case, *i.e.*, the date set by the ALJ for the filing of integration and diversification statements. *See* FCC 84M-3954. Our holding conforms with *Klein, supra*, because it is premised on avoiding prejudice to other applicants and advancing administra-

tive finality by fixing a definite filing date by which all applicants must abide equally. The "B" cut-off date, which has also served as the date by which divestiture pledges were to be made, *see, e.g., WHW Enterprises, Inc.,* 89 FCC 2d 799, 813-14 (Rev. Bd. 1982) (subsequent history omitted), is for the purpose of allowing amendments to the application concerning information reported therein; but here, because the application did not call for the reporting of interests in weekly newspapers, there was nothing to amend on that date.[2] Of course, as we stated in *Northland, supra,* this does not mean that comparative positions for all purposes will be fixed only at the exhibit exchange date or the date the ALJ calls for complete statements. For example, integration credit will not be allowed for an individual who becomes a principal after the "B" cut-off date, nor will credit be given when a principal's ownership increases after the "B" cut-off date. *Id.* at 917; *Mountain Media, Inc.,* FCC 85R-66, released August 12, 1985, at para. 3. And, because the application form requires this information, pledges to divest cable television interests, daily newspaper holdings, and other broadcast interests must still be made by the "B" cut-off date. In sum, no diversification demerit will be assigned in this case because Barton's divestiture commitment was timely made.

6. *Integration of Ownership and Management.* Barton is a general partnership consisting of two persons, Ernest F. and Manuela M. Barton, who are 40% and 51% owners, respectively. Each proposes to work at least forty hours per week in management positions at the station. *I.D.,* paras. 4, 8, and 17. Similarly, FHT is a general partnership consisting of Frankie P. and Hortencia L. Rodriquez, who hold 51% and 49% ownership shared, respectively. Both partners will serve in full-time management roles at the station, working at least forty hours per week. *I.D.,* paras. 21, 23, and 27. The ALJ awarded both applicants 100% full-time quantitative integration credit. *I.D.,* para. 36. Focusing solely on the qualitative enhancement factors to distinguish the applicants, the ALJ found them equal on past broad-

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[2] In a supplement to its reply brief, FHT relies on *Women's Broadcasting Coalition, Inc., supra,* in which, it argues, the Commission declared broadly at n. 18 that "as to existing interests a divestiture commitment must be made by the B cut-off date." There, however, the question was whether the divestiture pledge of an interest *acquired after* the "B" cut-off date was sufficiently contemporaneous to the acquisition to be credited. In context, the Commission was discussing a cable interest which, as noted earlier, is reportable on the application form and is thus subject to the "B" cut-off upgrading date. The case cited for support by the Commission in n. 18, *Colorado Television, Inc.* 56 RR 2d 1080, 1087-88 (Rev. Bd. 1984), also involved cable interests.

cast experience but on the basis of what he perceived to be Barton's superior attributes for local residence and civic participation, he awarded a moderate to substantial integration preference to Barton. *I.D.*, para. 38. In its exceptions, FHT argues that, at most, Barton should receive only a slight integration preference.

7. We agree with FHT that Barton should receive a slight integration preference. Neither applicant has excepted to the ALJ's conclusion that both are entitled to 100% quantitative credit. In these circumstances, where the sole differences between the applicants are their qualitative enhancements, we have traditionally awarded the superior applicant no more than a slight overall preference. *See Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1112 n. 7 (Rev. Bd. 1984), *rev. denied*, 100 FCC 2d 941 (1985); *Phoenix Media Corp.*, 56 RR 2d 1241, 1250 (Rev. Bd. 1984), *rev. denied*, FCC 85-435, released August 6, 1985; *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 496-7 (Rev. Bd.), *recon. denied*, 56 RR 2d 1260 (Rev. Bd. 1984), *rev. denied*, 58 RR 2d 439 (1985) (subsequent history omitted). Although the ALJ erred in overstating the degree of preference deserved, he was correct that Barton has the superior integration proposal. Specifically, it is substantially better on local residence because its owners have lived in Lubbock since 1967 whereas FHT's owners only propose to move to Lubbock in the future. *I.D.*, paras. 12, 19, 25 and 29. Furthermore, both Mr. and Mrs. Barton have had long and continuing involvement in a variety of Lubbock community activities in contrast to FHT's principals who have had no such civic participation background. *Id.* at 12-15, 20. Finally, although the ALJ found the applicants equal on broadcast experience, we believe Barton is superior here as well. While FHT's Mr. Rodriquez has had more recent experience dating from 1976, Mr. Barton's experience goes back to 1955, is of considerably greater duration than that of Mr. Rodriquez, and includes ownership interests as well as full-time general manager experience, neither of which Mr. Rodriquez has had. *See id.* at 10-11, 26. In sum, Barton is undoubtedly superior to FHT on all three of these enhancing factors. The applicants are equal on minority ownership and participation and virtually equal on female enhancement, albeit the current status of Commission policy in the latter area is in doubt. *See Talleyrand Broadcasting*, 59 RR 2d 563, 567 (Rev. Bd. 1985).

8. *Comparative Coverage*. FHT will serve an overall population of 210,000 whereas Barton will serve a population of 165,785. There are five or more primary aural services available within

each of the applicant's uncommon service areas. *I.D.*, para. 31. Based on this disparity, the ALJ awarded FHT a very slight coverage preference. *I.D.*, para. 39. FHT argues in its exceptions that its preference should be elevated to slight. Slight preferences have been awarded to applicants having *substantial* overall coverage advantages where the entire service areas were well-served. *See Simon Geller*, 90 FCC 2d 250, 268-9, 276 (1982) (subsequent history omitted) (coverage superiority of 315,000); *Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, 231, (Rev. Bd. 1984) (coverage advantages of 633,000 and 705,000), *modified*, 101 FCC 2d 1010 (1985). On the other hand, where coverage disparities in well-served areas have not been as great, only very slight preferences have been awarded. *See Family Broadcasting Group*, 93 FCC 2d 771, 778-9 (Rev. Bd. 1983) (coverage advantages of 42,000 139,000, and 180,000); *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 518 (Rev. Bd. 1982) (coverage advantage of 111,000), *rev. denied*, 55 RR 2d 23 (1983) (subsequent history omitted). Thus, it is clear that FHT's 44,000 coverage advantage yields only a modest preference and that the preponderance of Commission precedent supports the ALJ's analysis. *See Caldwell Broadcasting Corp., supra*, 57 RR 2d at 1048-49 (65,000 coverage advantage plus minor underserved area coverage yields very slight preference.) The cases relied on by FHT, *Wolverine Radio Co., Inc.*, 49 FCC 2d 1043, 1051 (ALJ), *aff'd*, 49 FCC 2d 1038 (Rev. Bd. 1974), and *Christian Broadcasting of the Midlands, Inc.*, 99 FCC 2d 578 (Rev. Bd. 1984), *rev. denied*, FCC 86-77, released February 14, 1986, both involved underserved areas. Thus, FHT's exception is denied.

9. *Comparative Summary*. All decisionally significant exceptions have been considered. Neither applicant has received a diversification preference. Barton has been awarded a slight integration preference and FHT has been given a very slight coverage preference. Barton, having the stronger and more important preference for integration, a "factor . . . of substantial importance," *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965), is the preferred applicant. *See Northern Sun Corp.*, 100 FCC 2d 889, 895 (Rev. Bd.), *recon. denied*, 100 FCC 2d 1440 (Rev. Bd. 1985), *rev. denied*, FCC 86-135, released March 28, 1986; *Cannon's Point Broadcasting Co., supra*, 93 FCC 2d at 656. We emphasize that Barton's integration superiority extends to all three areas in which the applicants differ — local residence, civic participation, and broadcast experience — whereas FHT's coverage advantage is on the

single aspect of coverage to well-served areas. A grant of Barton's application will best serve the public interest, convenience, and necessity.

10. ACCORDINGLY, IT IS ORDERED, That the petition to file supplement, filed January 9, 1986 by FHT Broadcasting IS GRANTED, and the supplement IS ACCEPTED; and

11. IT IS FURTHER ORDERED, That the application of Barton Broadcasting Company (File No. BPH-831027AL) for authority to construct a new FM broadcast station on Channel 292A at Lubbock, Texas IS GRANTED, and the application of FHT Broadcasting (File No. BPH-831027AM) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 85D-68

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Ernest F. and Manuela M. Barton d/b/a BARTON BROADCASTING COMPANY Lubbock, Texas	MM Docket No. 84-728 File No. BPH-831027AL
Frankie Paul Rodriquez & Hortencia Lilia Rodriquez d/b/a FHT BROADCASTING Lubbock, Texas	MM Docket No. 84-729 File No. BPH-831027AM
For Construction Permit for a New FM Station	

Appearances

Thomas L. Root, on behalf of Ernest F. and Manuela M. Barton, d/b/a Barton Broadcasting Company; *Barbara M. Barron* and *Lee J. Peltzman*, on behalf of Frankie Paul Rodriquez & Hortencia Lilia Rodriquez d/b/a FHT Broadcasting; and *Larry Miller*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: October 21, 1985; Released: October 23, 1985

Preliminary Statement

1. Barton Broadcasting Company (Barton) and FHT Broadcasting (FHT) are the two remaining competing applicants in what began as a nine-party proceeding for selection of a permittee of a new commercial FM broadcast station on Channel 292A, Lubbock, Texas. The proceeding was designated for hearing by a *Hearing Designation Order* (Mimeo 5805, released August 9, 1984). The

remaining issues relating to the two applicants are the following:

1. To determine whether the proposals of Barton and FHT[1] would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's rules, and, if not, whether circumstances exist which warrant waiver of that Section.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. A prehearing conference was held October 10, 1984, and hearing sessions were held February 5 and 6, 1985. The record was closed on May 14, 1985. See Order, FCC 85M-2072, released May 14, 1985. Proposed findings and conclusions of law were filed June 17, 1985 by the Mass Media Bureau and June 24, 1985 by Barton and FHT. A Reply was filed July 10, 1985 by FHT.

Findings of Fact

Barton City Coverage Issue

3. On March 15, 1985, Barton filed a petition for leave to amend and associated amendment to change its proposed transmitter site. This petition was granted and the amendment accepted by the Presiding Judge, by *Order*, FCC 85M-1764, released April 19, 1985.[2] Based upon this amendment, Barton has calculated its population and area coverage as follows:

	Population	*Area (sq.mi.)*
Lubbock, Texas	174,484	101.9
70 dBu coverage within the city limits of Lubbock	174,351	99.2
Percentage of City covered	99.9%	97.4%

(Barton Broadcasting Company Ex. 6)

Standard Comparative Issue

Barton Broadcasting Company

4. Barton is a Texas partnership of two persons, Ernest F. and Manuela M. Barton (Barton Exh. 1):

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[1] The city coverage issue designated against FHT was summarily resolved in its favor. See *Order*, FCC 85M-760, released February 19, 1985.

[2] On July 5, 1985, Barton submitted a Notice from the FAA containing a determination that the proposed site did not pose a hazard to air navigation.

Name	*Positions with Partnership*	*Percentage of Ownership*
Ernest F. Barton	General Partner	49.00 percent
Manuela M. Barton	General Partner	51.00 percent

5. Ernest Barton is the sole owner and publisher of the *West Texas Hispanic News*, a weekly newspaper in Lubbock. Approximately 5,000 copies of the newspaper are given away at grocery stores and other distribution points each week (Barton Ex. 1, p. 2; Tr. 90). The newspaper, which is staffed by Mr. Barton and a part-time college student, consists of a mix of Lubbock local news concentrating on the Mexican-American community and advertising. The newspaper primarily relies on news releases from government and non-government bodies and information obtained from phone calls. The newspaper focuses on items of interest to the Mexican-American community which are not covered by the "daily, anglo, English-speaking paper." The newspaper does not editorialize (Tr. 98–100).

6. Lubbock has three other newspapers in addition to the *West Texas Hispanic News* — the Lubbock Avalanche-Journal, which publishes a morning and afternoon edition five days a week and one edition on Saturday and Sunday; a weekly black-oriented newspaper; and a weekly Chicano newspaper, *El Editor*; which, according to Mr. Barton, "varies a little bit from a Mexican-American oriented paper" (Tr. 100–102).

7. Mr. Barton has pledged to divest himself of all interest in the newspaper upon grant of a construction permit to Barton Broadcasting (Barton Ex. 1, p. 2). This pledge was not made prior to the B-cutoff date; it was first made in his integration statement (Tr. 92).

8. *Ernest F. Barton*: Mr. Barton is proposed to be integrated as general manager of Barton's proposed station (Barton Ex. 2). He will devote at least forty (40) hours weekly to this position, including regular office hours from Monday through Friday, as well as such additional time on the evenings and weekends as necessary. He will have no other part-time or full-time employment (Barton Ex. 2).

9. As a general partner and general manager, Mr. Barton will be responsible for the overall operation of the station, for determining the type of format, minimum amount of time to be devoted to news, public affairs and other nonentertainment programming, station policy on political advertising and "fairness-doctrine" type access. He will be responsible for ensuring that the

station's operation in all respects complies with the rules and policies of the FCC, and for directly supervising all sales activities and business affairs of the station (Barton Ex. 2).

10. From 1955 through 1962, Mr. Barton was a full-time employee of radio station KTFY in Brownfield, Texas in charge of Spanish programs (Barton Ex. 2, p. 2). He left KTFY for KVOZ in Laredo, where he was also in charge of Spanish programs (Barton Ex. 2, p. 2; Tr. 158). At both these stations, Mr. Barton also performed some public relations, sales and announcing functions (Barton Ex. 2, p. 2). In 1967, Mr. Barton left KVOZ and went to work as general manager of KLFB, a Spanish-language radio station in Lubbock, and remained there until 1973 (Barton Ex. 2, p. 3). At different times during this period, he held as much as a 25% ownership interest in that station (Tr. 159). From 1975 through 1977, Mr. Barton was employed as the full-time general manager of radio station KWGO-FM in Lubbock (Barton Ex. 2, p. 2).

11. For the past 12 years, Mr. Barton has produced, directed and served as one of the hosts of "Si Se Puede," a weekly hour-long program broadcast on commercial television broadcast station KAMC(TV), Lubbock Texas. The program is a public affairs and entertainment program intended for Spanish-speaking persons (Barton Ex. 2, p. 3; Tr. 163–164).

12. Mr. Barton has lived in Lubbock since 1967. He has been involved with the American Legion and Christ the King Catholic Church since that time but has held no leadership positions or served on any committees in either organization (Barton Ex. 2, p. 4; Tr. 166). Similarly, he has been a member of the Rotary Club since 1976 but has held no leadership positions (Barton Ex. 2, p. 4; Tr. 167).

13. Mr. Barton was a member of the Lubbock chapter of the League of United Latin American Citizens from 1966 through 1976, served as President in 1968 and District Director in 1969 (Barton Ex. 2, p. 4; Tr. 167). In 1969 he also served on the Executive Board of the Lubbock Opportunities Industrialization Commission and was a member through 1970 of the Bilingual Education Community Committee (Barton Ex. 2, p. 4).

14. In 1970–71, Mr. Barton served on the City Auditorium-Coliseum Board, the Municipal Facilities and Services Committee. He served on the Steering Committee for the Rehabilitation of Lubbock in 1970 (for which he received a commendation from President Nixon), the Lubbock Citizens Traffic Commission in 1972, the Board of Directors of the Legal Aid Society of Lubbock

in 1976, the Board of Directors of the Salvation Army in 1974, the Electric Utility Board of the City of Lubbock from 1976 to 1977, and on the Executive Board of SER (a Mexican/American manpower program) from 1972–1974 (Barton Ex. 2, p. 4–5; Tr. 167–168). He also worked with the Lubbock Association of Presbyterian Churches from 1972 to 1974 and with Learn, Inc. from 1971 to 1977 (Barton Ex. 2, p. 4; Tr. 167–169).

15. Mr. Barton was a Member of the Mexican-American Chamber of Commerce from 1975 to 1982 and served on the Board of Directors of that organization for one year (Barton Ex. 2, p. 4; Tr. 168). He also served on the annual festival committee of the Fiestas Mexicana for the 1981 festival (Barton Ex. 2, p. 5; Tr. 169).

16. Mr. Barton is Hispanic (Barton Ex. 2, p. 2).

17. *Manuela M. Barton*: Ms. Barton is proposed to be integrated as full-time office manager of Barton's proposed station (Barton Ex. 3). She will devote at least forty (40) hours weekly to this position, including regular office hours from Monday through Friday, as well as such additional time on the evenings and weekends as necessary. She will have no other part-time or full-time employment (Barton Ex. 3).

18. As office manager, Ms. Barton will be responsible for the day-to-day management of the office, including maintenance of required station records, management of station financial matters and accounting, maintenance of the advertising order and billing system, and control of the station's efforts to ascertain the problems, needs and interests of the community. Together with Mr. Barton, she will determine overall station programming policy, such as determining type of program format, minimum amount of time to be devoted to public affairs, news and other nonentertainment programming, station policy on political advertising and editorials and "fairness doctrine"-type access (Barton Ex. 3, p. 1). She will not be reporting to anyone at the station; she will have the "last word on everything that's going to be going on" (Tr. 195–196).

19. Ms. Barton is a Hispanic female who has resided in Lubbock since 1968 (Barton Ex. 3, p. 2).

20. Ms. Barton is an employee of the Social Security Administration and works in Lubbock as a claims representative. She received a Commissioner's citation from the Administration in 1980 for her volunteer activities in making information about the Social Security Administrator available to Lubbock residents. Her other civic activities include membership in the League of United

Latin American Citizens from 1969 through 1979 and service as vice-president in 1972 and 1973 (Barton Ex. 3, p. 2; Tr. 185-186).

FHT Broadcasting

21. FHT Broadcasting is a Texas general partnership, having the following owners (FHT Ex. 1).:

Name	*Positions with Partnership*	*Percentage of Ownership*
Frankie P. Rodriquez	General Partner	51.00 percent
Hortencia L. Rodriquez	General Partner	49.00 percent

22. Neither FHT nor either of its principals has interest in any media of mass communications (FHT Ex. 3). Mr. Rodriquez is currently employed as Program Director for radio station KLBJ-AM in Austin, Texas and intends to terminate this employment upon grant of FHT's application (FHT Ex. 3, p. 1). Mr. Rodriquez made a commitment to divest himself of his management position in another station prior to the "B" cut-off.

23. *Frankie P. Rodriquez*: Mr. Rodriquez will serve as full-time general manager of the proposed station, working at least 40 hours weekly (FHT Ex. 2).

24. As general manager, Mr. Rodriquez will be charged with primary responsibility for directing all aspects of the station's operation. He will coordinate the operation of the various departments in the station such as programming, traffic, production, sales and news. He will establish and direct implementation of the station's overall operating policies and practices, including its procedures for compliance with the Rules and Regulations of the Federal Communications Commission (FHT Ex. 5).

25. Mr. Rodriquez lives in Austin, Texas. He proposes to move to Lubbock upon grant of the FHT application. He is a Hispanic male. *Id.*

26. Mr. Rodriquez worked full-time for a summer prior to 1976 in programming and sales for KRUN, Ballenger, Texas. From 1976 through 1978, he worked part-time as a newsman and weekend disc jockey at KGKL, San Angelo, Texas. From 1978 through 1978, he worked for WOAI, San Antonio, first as a traffic reporter, then as courthouse correspondent and, toward the end of his term at WOAI, as afternoon assignments editor. In April of 1979, Mr. Rodriquez became news director at radio station KLBJ and KLBJ-FM, Austin, Texas. He held that position until November of 1983, when he was promoted to

Program Director of KLBJ(AM). He is presently employed by KLBJ (FHT Ex. 5).

27. *Hortencia Lilia Rodriquez*: Ms. Rodriquez will serve as full-time Operations/Business Manager at the proposed station, working at least 40 hours weekly (FHT Ex 5, p. 1).

28. As Operations/Business Manager, Ms. Rodriquez will have overall responsibility for managing station personnel including hiring, firing, and overseeing on-air and off-air staff. Her duties will also include responsibility for the day-to-day running of the office, the station's Traffic Department and Equal Employment Opportunity Programs. She will coordinate with the General Manager and Program Director to insure that the station fulfills its public affairs programming and public service announcement commitments (FHT Ex. 6).

29. Ms. Rodriquez lives in Austin, Texas, but proposes to move to Lubbock if the FHT application is granted. She is a Hispanic female (FHT Ex. 6).

Comparative Coverage

30. The Commission, in its Hearing Designation Order, noted that data submitted by the applicants indicated that there would be a significant difference in the size of the areas and populations which would receive service from the various proposals. The Commission therefore stated that the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, would be considered under the standard comparative issue for the purposes of determining whether a comparative preference should accrue to any of the applicants.

31. A Joint Exhibit containing a stipulation by the parties as to areas and populations was submitted by the applicants in lieu of a Joint Engineering Exhibit. The stipulation indicates that, according to the engineering proposals submitted on or before the "B" cut-off date, FHT Broadcasting would serve a population of 210,000 and Barton Broadcasting Company would serve a population of 165,785 (Jt. Ex. 1, p. 1). The stipulation further discloses that there are five or more primary aural services available within each of the applicant's uncommon service areas.

Auxiliary Power

32. FHT and Barton will equip the proposed station with auxiliary power (FHT Ex. 4; Barton Ex. 4).

CONCLUSIONS

Barton City Coverage Issue

33. Barton has shown that it will cover 99.9% of the population and 97.4% of the area of Lubbock with a 70 dBu signal. In view of Barton's substantial compliance with the coverage requirements of Section 73.315(a) of the Commission's Rules, a waiver of that rule will be granted. Other applicants in this proceeding have been granted waivers of this Rule based on lesser coverage of the city of Lubbock; Jerrico Broadcasting — 95.02%, *HDO*, at paragraph 7; FHT — 98.57%, *Order*, 85M-760, released February 19, 1985.

Standard Comparative Issue

34. The comparative issue must be decided in accordance with the *Commission's Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The Policy Statement sets forth two major goals toward which the comparative process is to be directed, *i.e.*, (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communications.

Diversification

35. FHT and its principals do not own any media interests. Ernest F. Barton, who holds a 49% ownership interest in Barton, owns and publishes a local weekly newspaper. Since Barton's divestiture commitment was made after the B cut-off date, the media interest must be considered. "The approximate weight to be given to media interests under the diversification criterion is directly related to the type of media, size of ownership interest, proximity of media to applicant's proposed community of license, significance of media in terms of area covered, size of audience, number of facilities, etc., significance in terms of regional or national coverage, and significance with respect to other media in their respective localities. 1 FCC 2d at 395, 5 RR 2d at 1909." *Caldwell Broadcasting Corporation*, 57 RR 2d 1039, 1044-1045 (Rev. Bd. 1985). Media interests in the same type of service as the subject applications are more significant, *per se* than other media holdings. *Daytona Broadcasting Co., Inc.*, 55 RR 2d 1326, 1355 (Rev. Bd. 1984). Using this criteria, it is clear that Barton's media interest is entitled to some weight under the diversification criterion. This conclusion rests on the fact that the principal

involved (Ernest Barton) is a 49% integrated owner of the applicant and the newspaper involved is located in the proposed city of license. *Cannon's Point Broadcasting Co.*, 53 RR 2d 953 (Rev. Bd. 1983), cited by FHT, for the proposition that the media interest is *de minimis*, is inapposite. In that case, the principal with the newspaper connection was a 0.47% unintegrated stockholder of the applicant and the newspaper itself was located in another, much smaller community. However, considering the fact that the *West Texas Hispanic News* is one of three weekly newspapers, its limited circulation and specialized nature, and the publication in Lubbock of a daily newspaper of general circulation, FHT warrants only a slight diversification preference over Barton. See *Caldwell, supra*; *Merrimack Valley Broadcasting*, 52 RR 2d 1210 (Rev. Bd. 1982).

Best Practicable Service

Integration

36. FHT and Barton are entitled to 100% quantitative integration credit. Since the applicants are equal on quantitative grounds, analysis must focus upon qualitative enhancement factors which are personal attributes of the owners such as local resident, civic activities, broadcast experience and minority ownership. See *Vacationland Broadcasting Co., Inc.*, 55 RR 2d 1299, 1306 (Rev. Bd. 1984). Minority ownership is not a factor in this case since FHT and Barton propose 100% minority ownership.[3] Barton receives 100% substantial local residence credit since Mr. and Mrs. Barton have lived in Lubbock since 1967. Local residence, along with minority ownership, is a fundamental consideration in the Commission's licensing scheme and is entitled to substantial weight in comparative proceedings. *Radio Jonesboro, Inc.*, 57 RR 2d 1564, 1567 (1985). FHT receives only very slight local residence credit for the proposed move of its owners to the community of license. *Vacationland, supra.*

37. Barton receives 100% moderate enhancement credit for civic participation. FHT argues that Barton should only receive very slight to slight enhancement credit on the ground that much of the civic involvement occurred in the 1960s and 1970s. FHT

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[3] FHT and Barton seek credit for female ownership. Since Barton proposes 51% female ownership while FHT proposes 49% female ownership, this factor would not alter the outcome of this case. In any event, the practice of giving credit for female status was set aside in *Steele v FCC*, No. 84-1176 (D.C. Cir. August 23, 1985). See also *KIST Corp.*, FCC 85-512, released September 24, 1985, at footnote 12.

cites, in support, *Veterans Broadcasting Co., Inc.*, 38 FCC 25, 61 (1965). This contention is rejected. Unlike *Veterans*, there has been no withdrawal from civic participation. On the contrary, the record reflects a continuing involvement on the part of the Bartons in civic affairs. Credit is awarded because civic involvement indicates a knowledge and interest in the community to be served. The Bartons' varied and extensive long-time civic involvement merits the award of a moderate enhancement credit for civic participation. *Radio Jonesboro, supra,* 57 RR 2d at 1568–1569.

38. Barton and FHT receive enhancement credit for the past broadcast experience of Mr. Barton and Mr. Rodriquez, respectively. Barton's experience is of greater duration and also includes an ownership interest and work as a general manager. However, Mr. Rodriquez's experience is more current. In addition, Mr. Rodriquez holds a 51% ownership interest in the applicant as opposed to Mr. Barton's 49% ownership interest. Contrary to FHT's assertion, the benefit of Mr. Barton's previous broadcast experience is not totally lost because of the passage of time. *Radio Jonesboro, supra,* at 1567–1568. On the basis of the offsetting factors, discussed, *above*, the applicants are judged equal on prior broadcast experience.[4] On the basis of Barton's local residence and civic participation advantages, Barton will be awarded a moderate to substantial integration preference over FHT.

Comparative Coverage

39. FHT will serve a population of 210,000 while Barton will serve a population of 165,785. There are five or more primary aural services available within each of the applicant's uncommon service areas. A slight preference for overall coverage has been awarded where an applicant proposed to provide service to more than three times as many people as another applicant. *Daytona Broadcasting Co., Inc.*, 55 RR 2d 1326, 1341 (Rev. Bd. 1984); see also *Simon Geller*, 90 FCC 2d 250, 276 (1982). Here, since the disparity (22% more people) is much less, FHT warrants only a very slight preference over Barton.

Final Comparative Evaluation

40. FHT has received a slight diversification preference and a very slight comparative coverage preference over Barton. Barton

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[4] Past broadcast experience is an enhancement factor of only "minor significance". *Policy Statement,* 1 FCC 2d at 395.

receives a moderate to substantial integration preference over FHT. Barton's integration preference outweighs FHT's preferences. It is therefore concluded that a grant of Barton's application will better serve the public interest.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Barton Broadcasting Company for a construction permit for a new FM Station IS GRANTED, and the application of FHT Broadcasting IS DENIED.[5]

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH CHACHKIN, *Administrative Law Judge*

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[5] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not reivew the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Employment, Equal Opportunity Rule
Reconsideration, Petition for, Denial of

Memorandum Opinion and Order adopted denying the National Black Media Coalition's Petition for Reconsideration of the Commission's Memorandum Opinion and Order denying a petition for rulemaking to amend the Broadcast Network Affiliation Rules and Employment Practice Rules. The Commission feels that any action on the merits of the original petitioner's proposal would be premature prior to resolution of the issues raised in a related proceeding (MM Docket 85-350).
—*B/c Network Affiliation*

FCC 86-256

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Petition for Rule Making to Amend the Broadcast Network Affiliation Rules and Employment Practice Rules to Extend to Networks and Licensee Headquarters, Employment Practice Requirements Now Mandated for Licensees	RM-3397

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 1986; Released: May 29, 1986

BY THE COMMISSION:

1. Before the Commission is a Petition for Reconsideration filed by the National Black Media Coalition (NBMC) on December 26, 1985. NBMC requests that the Commission reconsider its action in a *Memorandum Opinion and Order* (*Order*) adopted November 14, 1985, 50 FR 50329, which, *inter alia*, denied a Petition for Rule Making filed by Citizens Communications Center (Citizens) on behalf of NBMC and several others in the above-captioned matter.[1] In its petition, which was filed on June 13,

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[1] The other parties to the rule making petition included the National Association

1979, Citizens asked the Commission to extend the broadcast equal employment opportunity (EEO) rules, policies, and procedures to broadcast networks and headquarters offices of multiple broadcast station licensees.[2] Citizens proposed that these organizations be required to comply with the Commission's rules and policies concerning nondiscriminatory employment practices and affirmative action plans and to submit Annual Employment Reports (FCC Form 395).

2. The *Order* denying Citizens' petition was adopted the same day the Commission, in a separate action, adopted a *Notice of Proposed Rule Making* (*Notice*) in MM Docket No. 85-350, to consider revisions to the broadcast EEO rules, policies, and information collection procedures.[3] This *Notice* was adopted in response to the Office of Management and Budget's (OMB) disapproval of several aspects of the existing broadcast EEO reporting requirements on the grounds that they are inconsistent with the provisions of the Paperwork Reduction Act of 1980.[4]

3. At the time the Commission adopted the *Notice*, there were policy issues concerning broadcast EEO matters pending before the Commission in two petitions for rule making, one submitted by Citizens and the other by the National Radio Broadcasters Association, and in the proceeding in Docket No. 21474.[5] In view of OMB's disapproval of the broadcast EEO reporting requirements, the Commission concluded that any further action on broadcast EEO policy issues should be taken in the context of the new proceeding. The Commission, therefore, denied the outstanding rule making petitions and terminated the proceeding in Docket No. 21474.

4. In its request for reconsideration, NBMC contends that the issues addressed in the *Notice* are unrelated to the matter of extending the EEO rules and procedures to networks and licensee

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for the Advancement of Colored People, National Organization for Women, Media Reform Committee, Chinese for Affirmative Action, National Latino Media Coalition, National Congress of American Indians, National Association of Negro Business and Professional Women's Clubs, Inc., Black Citizens for a Fair Media, and National Council of La Raza.

[2] The proceeding in RM-3397 also included consideration of a proposal to implement a policy to promote minority oriented programming that was part of a package of proposals submitted by NBMC in RM-3502, on October 5, 1979. This proposal had been transferred by the Commission in an earlier action. *Memorandum Opinion and Order* in RM-3502, 47 RR 2d 138, 1980; *Order* para. 3.

[3] *Notice of Proposed Rule Making* in MM Docket No. 85-350, adopted November 14, 1985, 50 FR 59566.

[4] *Notice* paras. 4-6.

[5] *Order* paras. 2-4.

headquarters offices as requested in Citizens' petition. NBMC also argues that there is no mention of Citizens' proposal in the *Notice* and, therefore, the decision to transfer the network/licensee headquarters matter to the new proceeding constitutes administrative avoidance. NBMC requests that the Commission either set out its rationale for denying Citizens' petition, or issue a new notice of proposed rule making to request comment on the issues raised therein.

5. It is our belief that our administrative and policy priorities are addressed first to broadcast station licensees in the equal employment opportunity area. Indeed, Citizens' peitition sought to extend *all* broadcast EEO policies to networks and headquarter units.[6] To the extent that the petitions sought enforcement for violation of *all* EEO policies, we believe it is appropriate first to determine the nature and scope of these obligations for broadcast licensees. MM Docket No. 85-350 raises a number of difficult questions concerning the most effective manner of proceeding with respect to those entities that are direct licensees of the Commission. Given our limited administrative resources and source of our jurisdiction, it is appropriate that MM Docket No. 85-350 focus on regulations applicable to specific broadcast stations. Although the *Notice* left it somewhat unclear as to the extent the matters in RM-3397 were available for comment, it was our intention to decline to broaden the scope of that proceeding.[7] Upon resolution of the issues therein, however, we may find it appropriate to address the issue of the applicability of the new rules — whatever they may be — to networks and/or corporate headquarter units.[8] Any action on the merits of Citizens' proposal prior to resolution of the issues in MM Docket

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[6] Citizens' petition proposed that "broadcast licensees be prohibited from affiliating with any network that fails to comply, and, that group license holders be foreclosed from renewal of any of their licenses unless there is compliance with existing Commission rules governing equal employment opportunity." *See* Citizens' petition at 2. No distinction was drawn between reporting and underlying EEO obligations. The proposal, therefore, encompassed all EEO policies, including both the underlying rules and the reporting obligations.

[7] Indeed, the only tangential mention of headquarters operations is found in footnote 14 of the *Notice*. *Notice* at 6. As NBMC observed, the footnote does not concern itself with all aspects of the Commission's EEO policies, but addresses the continued need for the existing requirements concerning the filing of statistical data (Form 395) from headquarters operations.

[8] Our decision herein does not prejudge the merits of Citizens' petition and obviously does not preclude its filing a similar petition after the issues in MM Docket No. 85-350 have been resolved.

No. 85-350 would, in our view, be premature. Accordingly, we affirm our denial of the petition.

6. Accordingly, pursuant to Section 1.115 of the Commission's rules, 47 CFR § 1.115, IT IS ORDERED that the National Black Media Coalition's Petition for Reconsideration of the Commission's *Memorandum Opinion and Order* concerning RM-3397 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Community Qualifications

> Review Board affirmed ALJ's determination that Fairforest, South Carolina is not a "community" under rule sec. 73.1120(a) and grant of mutually exclusive AM application for community of Morgantown, North Carolina.
>
> —*Beacon Broadcasting*
>
> MM Docket No. 84-1309

FCC 86R-32

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BEACON BROADCASTING Morganton, North Carolina	MM DOCKET NO. 84-1309 File No. BP-830421AC
NEW SOUTH BROADCASTING CORPORATION WASC, Fairforest, South Carolina	MM DOCKET NO. 84-1310 File No. BP-840712AE
For Construction Permit	

Appearances

George R. Borsari, Jr. and *Howard W. Simcox, Jr.*, on behalf of New South Broadcasting Corporation; *Samuel Miller* and *Jerrold Miller*, on behalf of Beacon Broadcasting.

DECISION

Adopted: May 16, 1986; Released: May 20, 1986.

BY THE REVIEW BOARD: JACOBS, BLUMENTHAL, AND ESBENSEN

BOARD MEMBER JACOBS:

1. When New South Broadcasting Corporation (New South), licensee of daytime AM Station WASC, Spartanburg, South

Carolina, proposed to change its community of license to nearby Fairforest in order to meet the AM acceptability criteria for other proposed changes in WASC's frequency and power (Tr. 209), Beacon Broadcasting (Beacon) raised objections to the licensing viability of Fairforest as a "community" under Section 73.1120(a) of the Commission's Rules, 47 CFR 73.1120(a). By Hearing Designation Order (HDO), Mimeo MM 2385, released February 6, 1985, New South's application was designated for evidentiary hearing on this issue (and others not relevant here), along with Beacon's mutually exclusive application for a new daytime AM station at Morganton, North Carolina. In the HDO, at para. 6, the Commission's Mass Media Bureau noted that despite New South's arguments that "Fairforest has distinct boundaries, its own post office and zip code, sixty-one businesses and a state-appointed magistrate," it was unable to conclude that Fairforest was in fact a cognizable community for Commission regulatory purposes. Ten months later, presiding Administrative Law Judge (ALJ) Edward Luton reached the same conclusion in a well-reasoned and comprehensive Initial Decision (I.D.), FCC 85D-73, released December 17, 1985, following a two-day hearing. He denied New South's application and granted Beacon's.

2. Exceptions and reply briefs concerning the I.D. were duly filed by New South and Beacon, and oral argument was held before the Review Board on April 4, 1986. Wistfully noting a recent law journal article which extolled the virtues of an oral decision or "bench opinion" in simple tax proceedings,* but also cognizant that neither the Communications Act of 1934 nor the Administrative Procedure Act of 1946 nor our Rules authorize such a procedure even in open-and-shut Commission cases, the Board advised the parties at the conclusion of the argument that New South had failed to meet its burden of proof on the "community" issue. We also announced that we would allow a month for the parties to pursue settlement negotiations before the Board would issue a formal written Decision denying New South's application. Tr. 347-49. No settlement agreement having been proffered, we hereby adopt the ALJ's findings of fact and conclusions of law *in toto* and summarily affirm grant of Beacon's application, consistent with *Mighty-Mac Broadcasting Co.*, 101 FCC 2d 303, 58 RR 2d 599 (Rev. Bd. 1985), and *Debra D. Carrigan*, 100 FCC 2d 721, 58 RR 2d 96 (Rev. Bd.), *recon. denied*,

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* Sterrett, "The U.S. Tax Court: Innovation and New Procedures Help in Managing Over 70,000 Cases," 33 Fed. Bar News & J. 120, 122 (1986).

101 FCC 2d 218, 58 RR 2d 111 (Rev. Bd. 1985).

3. New South's exceptions, all of which pertain to the "community" issue, are without merit. The hearing was wasted on New South. It adduced no admissible evidence that it had not proffered prior to the HDO, other than the self-serving testimony of its 24% owner and principal, K. Joseph Sessoms, who lived in the Fairforest area for a year in 1965 (Tr. 85); it declined to produce for cross-examination two officials of the Spartanburg County Planning Commission on whose letter correspondence it attempted to rely (Tr. 71; New South Exh. 6, Attachments A and H); and it did not attempt to introduce into evidence an alleged Planning Commission map or any other documentary evidence identifying Fairforest as "Neighborhood 11" used in certain U.S. Bureau of the Census statistical reporting. Under these circumstances, the ALJ properly refused to credit Mr. Sessom's nonexpert and unsubstantiated beliefs and claims concerning the viability of "Fairforest" as a community entity for FCC licensing purposes, and the rest of New South's "evidence" was simply not sufficiently probative. See HDO, *supra*, and I.D., *supra*.

4. ACCORDINGLY, IT IS ORDERED, That the application of Beacon Broadcasting (File No. BP-830421AC) for a construction permit to establish a new AM broadcast station at Morganton, North Carolina, IS GRANTED, and the application of New South Broadcasting Corporation (File No. BP-840712AE) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

FCC 85D-73

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
BEACON BROADCASTING Morganton, North Carolina	MM DOCKET NO. 84-1309 File No. BP-840421AC
NEW SOUTH BROADCASTING CORPORATION WASC, Fairforest, South Carolina	MM DOCKET NO. 84-1410 File No. BP-840712AE

Appearances

George R. Bosari, Jr. and *Howard W. Simcox, Jr.*, on behalf of New South Broadcasting Corporation; *Samuel Miller* on behalf of Beacon Broadcasting; *Stephen Yelverton* on behalf of Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: December 12, 1985; Released: December 17, 1985

I. Preliminary Statement

1. This proceeding involves the mutually exclusive applications of New South Broadcasting Corporation (New South) and Beacon Broadcasting Corporation (Beacon) for a construction permit for an AM radio station on 760 kHz, New South proposes to change the frequency and power of its existing facility, WASC, in Spartanburg, South Carolina. New South also proposes to change to a new community of license, Fairforest, South Carolina. Beacon seeks to operate a new AM station in Morganton, North Carolina.

2. In the *Hearing Designation Order* released February 6, 1985, the applications were designated for hearing on the following issues.

> 1. To determine the nature of Ernest Penley's position as program director of WPTL, Canton, North Carolina, and whether, in light thereof, grant of

the application of Beacon Broadcasting would violate the Commission's cross-interest policy.

2. To determine whether Fairforest is a community for purposes of the Commission Rules.

3. To determine: (a) the areas and populations which would receive primary aural service from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

4. To determine, in the event it is concluded that a choice between the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, better serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. By *Order* released May 23, 1985 (FCC 85M-2223), the presiding officers added the following issue:

> To determine the areas and populations which would gain service from WASC in the event of a grant of New South's application, and from a grant of Beacon's application, and the availability of other primary services available to such areas and populations; and in the light thereof, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

4. The parties submitted proposed findings and reply proposed findings on September 3 and 4, 1985, and September 16 and 17, 1985.

II. Findings of Fact

The Applicants

a. Beacon Broadcasting

5. Beacon Broadcasting is a partnership comprised of two partners, Ernest Penley, Jr., and Sherrill Greene. Penley is a 52 percent owner, and Greene a 48 percent owner.

6. Ernest Penley, Jr., has been a resident of Morganton, North Carolina, for the past 7-1/2 years. He has been employed at Station WPTL, Canton, North Carolina, since June 1980. He is presently the operations manager of that station. He proposes to terminate this employment upon a grant of Beacon's application. Mr. Penley has no other media interest.

7. Prior to his employment at WPTL, Mr. Penley was employed at Bristol Electronics, Morganton, North Carolina, for a period of 11 months, commencing in February 1979. There, he was in charge of public and customer relations and also worked in sales. From January 1974 to February 1979, Mr. Penley was employed at Stations WMNC AM/FM, Morganton, North Carolina, in various capacities. He began as an announcer and later became the music director and eventually, the operations manager. Mr. Penley has been active in church affairs in Morganton since 1980. He has been a member of the PTA in Morganton for the past two years and has also devoted some time to the "Brownies" Scouting Troop.

8. Mr. Penley intends to serve as the station manager on a full-time basis (40 hours per week) upon a grant of Beacon's application. He will supervise all of the station's operations (Beacon Ex. 2).

9. Sherrill Greene has been a resident of Glen Alpine, North Carolina, which is adjacent to Morganton, since 1966. He has no interest in any medium of mass communications, and will not be involved in the day-to-day operation of the proposed station (Beacon Ex. 3).

b. New South Broadcasting Corporation

10. New South Broadcasting Corporation is a corporation organized under the laws of the state of South Carolina. Its principals are Sam E. Floyd, president/treasurer, a director, and 25 percent owner; K. Joseph Sessoms, secretary, a director, and 24 percent owner; and the estate of James E. Harrelson, 50 percent owner (New South Ex. 1).

11. K. Joseph Sessoms is a resident of Spartanburg, South Carolina, a city located within the 0.5 mV/m service contour of the proposed station. Mr. Sessoms has been employed at WASC since 1968 and has been the sales manager since 1976. He is currently employed at WASC as acting general manager on a full-time basis. Should New South receive a grant of its application, Mr. Sessoms will continue to work at the station as its general manager on a full-time (40 hours per week) basis (New South Ex. 2). Mr. Sessoms is a member of the Masonic Lodge, and the Ad Club Federation of Spartanburg, a local service organization for advertisers (New South Ex. 2).

12. Sam E. Floyd is currently a resident of Goldsboro, North Carolina. Mr. Floyd will not be involved in the day-to-day

management or operation of the station (New South Ex. 3).

13. Neither K. Joseph Sessoms, nor the estate of James E. Harrelson, has an ownership interest in any other medium of mass communications. New South President, Sam E. Floyd, has ownership interests in the following broadcast facilities:

WAFI, Fayetteville, North Carolina	15 percent
WGAC, Augusta, Georgia	15 percent
WMOO, Mobile, Alabama	7.5 percent
WBLX(FM), Mobile, Alabama	7.5 percent
WKML(FM), Lumberton, North Carolina	5 percent

Section 307(b) Issue

14. At the hearing, New South stipulated to the receipt and accuracy of Beacon's Exhibit No. 6 (Tr. 14, 15). That exhibit contains a comparison of the areas and populations that would gain service under each proposal. The figures representing the New South proposal include only those areas and populations beyond the current .5 mV/m service area of the existing New South facility in Spartanburg.

15. The engineering exhibit provides the following areas and populations data:

New South Coverage
Area gained under proposed .5 mV/m
Contour: 6,128.03 square miles
Population gained under proposed .5 mV/m
Contour: 546,196 persons

Beacon Coverage
Area served under proposed .5 mV/m
Contour: 2,043 square miles
Population served under .5 mV/m
Contour: 209,920 persons

16. As the entire geographic area receives a multitude of AM and FM services, neither applicant proposes service to an area served by five or fewer existing stations.

The Communities

a. Morganton, North Carolina

17. Morganton is the largest city in Burke County and is the county seat. Its population is 13,515 (1980 Census). The city is governed under the City Manager-Council system. As of July

1984, the city had a police force of 49 persons and a fire department consisting of 25 full-time employees and 13 volunteers.

18. Morganton has one high school, one junior high school, and four elementary schools. Other schools within the city limits are the North Carolina School for the Deaf, the Western Piedmont Community College, and two private schools — The Childrens School and the Tabernacle Christian School. The city has a public library which, according to the Burke County Chamber of Commerce, as of 1984, contained 118,067 volumes (Beacon Ex. 4).

19. The city has several churches representing various faiths, and there are three hospitals located there. Additionally, there are a number of civic, fraternal and other organizations located in Morganton (Beacon Ex. 4).

20. Morganton has its own daily newspaper, and there are two radio stations licensed to the city: Stations WMNC(AM) and WZXX(FM) (Beacon Ex. 4).

b. Fairforest, South Carolina

21. Fairforest is the name of an unincorporated place in Spartanburg County, South Carolina (New South Ex. 6). Although it has no legally defined boundaries, the location of Fairforest is shown on a General Highway Map of Spartanburg County, a map prepared by the South Carolina Department of Highways and Public Transporation.

22. According to New South principal Mr. Sessoms, at some unspecified time in the past and in circumstances which are not specified, he visited the offices of the Spartanburg County Planning Commission, and there saw a map apparently titled "Neighborhood Statistical Area, Spartanburg County Map" (Tr. 151). Depicted on this map, says Mr. Sessoms, was a certain "Neighborhood 11." Mr. Sessoms "under[stood] it from the Spartanburg County Planning Commission," that "Neighborhood 11" was Fairforest (Tr. 177). "Neighborhood 11" was shown on the map to be bounded by Interstate 85 on the north, Interstate 26 on the east, U.S. 29 on the south, and Road 122 on the west (Tr. 151). Mr. Sessoms did not know who prepared the map (Tr. 181), or how those boundaries came to be selected, but he did believe the boundaries were placed by the Spartanburg County Planning Commission (Tr. 177). Mr. Sessoms also believed that the map he saw was used somehow by the Bureau of the Census for some purpose (Tr. 182). The map is not in evidence in this proceeding.

23. New South Exhibit 9 consists of certain data compiled by the Bureau of the Census. The exhibit indicates that as of the year 1980, "Neighborhood 11" had a population of 2,941 persons.

24. Mr. Sessoms, now a resident of Spartanburg, resided in Fairforest for about a year and a half, during the mid-1960's (Tr. 241). He personally feels that the boundary of the four roads is somewhat restrictive of Fairforest (Tr. 245), but did not know whether the four roads constituted the boundary of the place as generally recognized by its residents (Tr. 85). He referred to the four roads as being the boundary of Fairforest as viewed by "many citizens", but could identify none of those citizens (Tr. 84). Finally, Mr. Sessoms testified that he knows that "residents of Fairforest, as well as local officials, considers the town to be a community with an identity distinct from those of surrounding towns", but he could not say whether "most" of the residents take that view (Tr. 205; New South Ex. 6).

25. [I]nterstate 85 is marked with highway signs indicating two exits for Fairforest (New South Ex. 6). Other local road signs point the way to Fairforest (New South Ex. 10-13).

26. The Southern Bell Telephone Directory for this area, entitled "Spartanburg, Cowpens, Pacelot", has no separate classification for Fairforest. Fairforest businesses and residences are all included in the "Spartanburg" section of the directory (Tr. 108-109).

27. Within the area bounded by the four roads, there are approximately 57 business establishments, among them, service stations, a lumber yard, a paper company, food stores and a drive-in movie theater (New South Ex. 6). A few of these businesses carry "Fairforest" as a part of their trade names, e.g., Fairforest Southern Warehouse, Fairforest Fibers, Fairforest Styling Salon, and Fairforest Fence. The pertinent telephone directory states the location "Fairforest" for some of the businesses, and a "Spartanburg" location for others of them; some of the businesses are shown as being located in the community of Westview, and others are not shown in the directory at all.

28. Fairforest has no local government of its own (Tr. 286). Governmental entities within the boundary of the four roads are (1) a U.S. Post Office, and (2) the offices of a state-appointed magistrate (Tr. 161). The post office has its own zip code and serves as an address for mail directed to persons who rent boxes there. There is no carrier delivery from this post office to any location bounded by the four roads (Tr. 167).

29. There are three public schools in Fairforest: Fairforest Elementary School, Fairforest Middle School, and Dawkins Middle School. The three schools serve a total of 1,724 students with some portion of this enrollment consisting of students residing outside the area bounded by the four roads (New South Ex. 6; Tr. 158). The Fairforest Middle School is the home of the Fairforest "Hornets" basketball and football teams. Each of the schools has its own PTA organization which meets on a monthly basis. The schools are operated as part of the largest District 6 school system, which is administered by Spartanburg County.

30. There are six churches located within the bounds of the four roads. Three civic or fraternal organizations are there: The Fairforest Masonic Lodge, the Order of the Eastern Star, and the Ruritan National. According to Mr. Sessoms, the Ruritan National is a businessmen's association, having among its members several persons who reside in Fairforest (Tr. 136-137). Mr. Sessoms was not familiar with the functioning of this organization (Tr. 138). The record is silent with respect to the functioning of the Masonic Lodge and the Eastern Star in Fairforest.

III. Conclusions of Law

The "community" issue

31. The term "community", as used by the Commission, describes "an identifiable population grouping separate and distinct from all others." *North Naples, Florida* 41 RR 2d 1549 (1977), at 1551. "Typically, in determining whether there exists such a population grouping, the Commission seeks to determine whether the location has sufficient attributes or indicia of 'community,' such as political, commercial, social, and religious organizations and services serving the community, or whether there is a sense of unity and involvement in community concerns as shown by evidence that the residents function as and conceive of themselves as a community around which their interests coalesce." *Mighty-Mac Broadcasting Co.*, 58 RR 2d 599 (1985), at 601. "In essence, the term community means a specific locality, with defined boundaries where the residents share common interests." *North Naples, supra*, at 1553. Measured by these tests, "Fairforest, South Carolina," is not shown on this record to constitute a "community" within the meaning of Section 73.1120(a) of the Commission's Rules.

32. Fairforest is an unincorporated place having no legally defined boundaries. In its proposed findings, New South makesthe following argument:

> "While Fairforest has no legal boundaries, the Spartanburg County Planning Commission, for statistical purposes, established the boundaries as Interstate 85 on the North, Interstate 26 on the east, U.S. 29 on the South and Road 122 on the west. (Tr. 151). According to the 1980 U.S. Census, Fairforest, as described by these boundaries, has a population of 2,941 persons. (New South Exhibit 6.)"

33. Much is obscured by the quoted language. No witness supplied by the Spartanburg County Planning Commission was presented by New South to state the position of that agency with respect to the matter of Fairforest's boundaries. New South offered no documentary evidence tending to show that the boundary of the four roads has been "established" by the Spartanburg Planning Commission. New South relies entirely on the testimony of its principal, Mr. Sessoms. That testimony, however, establishes very little in this regard.

34. Mr. Sessoms claims that on some unspecified occasion, he saw a map in the offices of the Spartanburg County Planning Commission which depicted a certain "Neighborhood 11" bounded by the four roads. Was "Neighborhood 11" on this map intended to describe Fairforest, South Carolina? No clear evidence in the record indicates this to be so. Mr. Sessoms offered only his "belief" that "Neighborhood 11" described Fairforest. He did not know who prepared the map, how or why the boundaries of "Neighborhood 11" came to be selected for placement on the map, or the purpose for which the map was used. Mr. Sessoms also did not know whether the four roads constituted the boundary of Fairforest as generally recognized by its residents.

35. New South strives to fill the evidentiary gaps with argument. Mr. Sessoms expressed his "belief" that the map which he claims to have seen was somehow to be used by the Bureau of Census for some purpose unknown to Mr. Sessoms. Without any evidentiary support, New South first asserts that the boundaries shown on the map were used by the Planning Commission "for statistical purposes." It then makes this claim about utilization of those boundaries by the Bureau of the Census: "According to the 1980 U.S. Census, Fairforest, as described by these boundaries, has a population of 2,941 persons." New South Exhibit 11 lists a "Neighborhood 11" and shows it as having a population of 2,941; New South urges the bare assumption that the "statistical purpose" for which the Planning Commission used the boundary

of the four roads was to enable the Census Bureau to list "Neighborhood 11" as having a population of 2,941. But, this is only counsel's view of the matter. New South's only live witness, Mr. Sessoms, gave no such testimony. He, in fact, knew neither how or whether the map was to be used by the Census Bureau.

36. Remarkably, neither the map, or a copy of the map, claimed to have been seen by Mr. Sessoms was offered in evidence by New South. The state of the record in this regard is even less satisfactory than the unsuccessful showing in *Naples, supra*, in which the petitioner included "unofficial maps of an unknown source which attempted to provide boundaries."

37. There are approximately 57 business establishments within the area bounded by the four roads. The local telephone directory has no separate classification for "Fairforest". The directory states the location "Fairforest" for some of the businesses, and a "Spartanburg" location for others; some of the businesses are shown as being located in the community of Westview, while others are not shown in the directory at all. A few of the businesses carry "Fairforest" as a part of their trade names, but no sense of the existence of Fairforest as a "community" emerges from a consideration of these various business establishments.

38. The case is not aided by consideration of other matters shown on this record. There are three elementary schools within the bounds of the four roads, each a part of the Spartanburg County school system. The schools serve students who reside within and beyond the boundary of the four roads. The name "Fairforest" is carried by two of the schools, but nothing else about them gives rise to a confident belief that Fairforest is a cohesive community. The record contains no showing regarding the six churches and three civic organizations which could reasonably give rise to a belief that they are dedicated significantly to serving the needs of a community named "Fairforest."

39. On this record, Fairforest is a place without boundaries defined in any way; the place is not shown to consist of a distinct population grouping, and its residents are not shown to function as a community around which their interests coalesce.

The Section 307(b) issue

40. If Fairforest, North Carolina, could be found to be the "community" claimed for it, New South would prevail under this issue as an applicant proposing a first local transmission service to that community. Morganton, North Carolina, is served by two existing stations.

Contingent comparative issue

41. Neither Beacon or any of its principals have cognizable interests in any medium of mass communications. New South principal, Sam E. Floyd, has minority ownership interests in five other stations outside of South Carolina. Beacon is entitled to a moderate diversification preference.

42. Beacon receives a moderate preference under the integration criterion. Beacon proposes 52% full-time integration through Ernest Penley, its proposed station manager. The proposal is enhanced by Mr. Penley's local residence and broadcast experience. New South is entitled to 24% full-time integration credit through K. Joseph Sessoms, its proposed general manager. The proposal is enhanced by Mr. Sessoms's service area residence and his broadcast experience.

43. Under its proposal, New South would serve 336,476 more persons, and cover 4,805 more square miles, than would Beacon under its proposal. As the proposed coverage areas currently receive five or more daytime services, the weight given New South's coverage advantage is reduced. New South receives a slight preference for its more efficient use of the spectrum. Overall, however, Beacon Broadcasting is the preferred applicant under the standard comparative issue because of its diversification and integration preference.

Ultimate Conclusions

44. Fairforest, South Carolina, is not a "community" for Commission licensing purposes, and the application of New South to serve Fairforest cannot be granted. A weighing of the comparative attributes of the applicants leads to the conclusion that Beacon Broadcasting is the superior applicant.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules,[1] the application of Beacon Broadcasting IS

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[1] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its public release pursuant to Section 1.276(d).

GRANTED, and the application of New South Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

EDWARD LUTON, *Administrative Law Judge*

Integration of Management and Ownership
Partnership Agreement
Remand

> Review Board remands proceeding to determine whether non-integrated limited partner husband possesses sufficient passivity to attribute full integration credit to integrated general partner wife.
>
> —*Chester Associates*
> MM Docket No. 84-525

FCC 86 R-48

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Giraud Chester & Marjorie F. Chester d/b/a CHESTER ASSOCIATES East Hampton, New York	MM DOCKET NO. 84-525 File No. BPH-830318AC
JOHN F. SHEA, III East Hampton, New York	MM DOCKET NO. 84-526 File No. BPH-830321AL
For Construction Permit For a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 1986; Released: August 1, 1986.

BY THE REVIEW BOARD:

1. By *Order*[1] released May 29, 1986, the Board requested the parties to comment on the applicability, *vel non*, of the Commission's latest decision in *Absolutely Great Radio, Inc.*, 60

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[1] *Chester Associates*, 60 RR 2d 497 (Rev. Bd. 1986). The underlying facts and circumstances are set out in the orders cited in notes 1 and 2, and need not be reiterated here.

RR 2d 355 (1986), to the case at bar. Both have submitted their comments. For reasons which follow, we have determined that the case must be remanded for further evidentiary hearing to determine whether Chester Associates' purported "limited" partner spouse has been, and will likely be, "passive", so as to attribute his 35% equity interest to his wife's "integration" factor.

2. The competing parties disagree on whether the Commission's declaration in *Absolutely Great* that it would not permit one spouse to disclaim active interest in a commonly owned applicant "in non-joint tenancy situations," 60 RR 2d at 359, precludes the attribution of Mr. Chester's 35% ownership interest here to Mrs. Chester, so that she might claim an effective 100% ownership "integration" factor for comparative purposes. It will be recalled that the most recent *Absolutely Great* formulation states:

> Our intent is to recognize those situations where one spouse is an owner in name only while the other will exercise complete control over the entire joint interest. This policy is not based on any peculiarity of joint tenancy (i.e., that each tenant has an undivided interest in the whole). However, because the survivorship attribute of joint tenancies, which is responsive to the estate planning motive, is not found in other forms of ownership we will not attribute ownership in non-joint tenancy situations. Nor do we anticipate attributing ownership in nonspousal relationships where the estate planning motive for forming a joint tenancy is not paramount.

Id., at 358–359.

3. Chester Associates contends that the foregoing language should not be taken literally to exclude "limited" partnerships as between spouses; Shea argues the opposite. After due consideration, we have determined that the more conservative course here would be to assume, *arguendo*, that the Commission may have overlooked our abeyance order in this case,[2] and left open the question of whether a husband and wife could avoid the operative impact of the most recent *Absolutely Great* result by structuring its co-spousal ownership with putatively "passive" equity interests (*e.g.*, "limited" partnerships; non-voting stock). Accordingly, we will not yet presume that such ownership structures are excluded for attributed "integration" purposes.[3]

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[2] *Chester Associates*, 102 FCC 2d 93 (Rev. Bd. 1985).

[3] *See also* Concurring Statement of Board Member Jacobs, 60 RR 2d at 501. *But compare* Pike & Fischer Rad. Reg. *Editors' Note* (supporting *Chester Associates* majority interpretation of *Absolutely Great*).

4. However, we will take appropriate guidance from the language and clear import of *Absolutely Great* in the following respect: Iterating a justifiable disinclination to guess whether one spouse will be "passive" towards the other in connection with jointly owned media properties,[4] the Commission sought to assure the court that strong, insulative measures must be present to ensure the complete "passivity" of the purportedly disinterested spouse before it would permit the allegedly "active" spouse to claim the other's equity share for comparative "integration" purposes. Thus, even in joint tenancies, where the estate planning motive between spouses might be "obvious" and "paramount", *Absolutely Great* requires the following prophylaxes:

> To summarize, we will attribute the interest of one spouse to the other for integration purposes where the spouses represent that only one of them is the intended actual owner, that the active spouse would exercise exclusive control and be the financial force behind the joint interest, and that the other spouse is given a totally derivative ownership interest as a joint tenant for estate planning purposes. Also, *the inactive spouse cannot participate in the preparation of the application, cannot be proposed to participate in any station activities and cannot assist in funding of the proposed station as a contributor, lender or loan guarantor.* These provisions are necessary to limit attribution to the most obvious cases and avoid undue delay of these proceedings.

60 RR 2d at 359 (emphasis added).

5. If the foregoing is required where the joint tenancy estate planning motive is both "obvious" and "paramount", then similar requirements would be, perforce, necessary to accept spousal "passivity" where the reasons for the interspousal ownership arrangement are inobvious and the estate planning motive is inapposite, as in the case at bar. We recognize that the underscored requirements, above, were not expressly articulated prior to the most recent *Absolutely Great*. Still, functional "passivity" has always been a requirement for the recognition (or non-recognition) of purportedly passive interests. *See, e.g., Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984). And, while the Commission has recently indicated that it would consider certain "limited" partnerships between husband and wife for ownership attribution purposes, *Attribution of Ownership*, 58 RR 2d 604, 620 (1985), it stated that it would do so only "on a

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[4] As did the court reviewing *Absolutely Great, see Ventura Broadcasting Co. v. FCC*, 765 F.2d 184, 189 (D.C. Cir. 1985) (adverting with approval to the Board's observation "that marriages, like joint tenancies, are run by agreement rather than by voting battles").

case-by-case basis, in appropriate circumstances." *Id.* Thus, although we do not here apply literally the substantive requirements of *Absolutely Great* on a retroactive basis, *see generally Yakima Valley Cablevision, Inc., v. FCC*, No. 85-1464, slip op. at 14-18; *see also Independent Masters Ltd.*, FCC 86R-33, released May 23, 1986, at n. 25 (*Attribution of Ownership* "limited" partnership standards not strictly applied retroactively), we will consider the underscored requirements of *Absolutely Great* as general guidelines to assure the absolute passivity of a purportedly "passive" spouse. Such case-by-case scrutiny is appropriate. *Attribution of Ownership, supra*; *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). Because it appears that insufficient evidence was taken at hearing to determine definitively whether Mr. Chester comes generally within the criteria set forth in *Absolutely Great*, *see* 60 RR 2d at 499,[5] we shall remand this case to the ALJ for a supplemental hearing on an appropriate issue. No application amendments anent this issue shall be accepted, so as to avoid impermissible "upgrading."

6. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the presiding Administrative Law Judge for further hearing in accordance with this opinion and for preparation of such Supplemental Initial Decision as may be warranted by a supplemental record.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

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[5] In its Comments (at 3-6), Chester Associates' points to the ALJ's findings regarding Mrs. Chester's "demeanor". However, "credibility of a witness may be of utterly no significance, as when a case turns on a question of public records or stipulated facts." *Hudson C. Millar, Jr.* v. *FCC*, 707 F.2d 1530, 1538 (D.C. Cir. 1983). As we've observed, the record here strongly suggests that Mr. Chester may not have been "passive" within the general purport of *Absolutely Great* (*see supra* para. 4). Indeed, he has not even testified in this proceeding, *see* 60 RR 2d at 500 n.5.

Community Qualifications
Comparative Issue, Contingent
Fair Distribution of Broadcast Facilities
Suburban Area

Applications for a Class C FM station, in suburban communities contiguous to nearby dominant metropolitan area which have mutual interests and similar characteristics, and which propose to serve the same areas, are entitled to equal consideration under Section 307(b) of the Act. Applicants are to be evaluated on basis of contingent standard comparative issue.

—*Debra D. Carrigan*

MM Docket No. 83-858

FCC 86-317

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

DEBRA D. CARRIGAN North Las Vegas, Nevada	MM DOCKET NO. 83-858 File No. BPH-810909AH
CONSTANCE J. WODLINGER North Las Vegas, Nevada	MM DOCKET NO. 83-859 File No. BPH-820322AW
SILVER STATE COMMUNICATIONS, INC. North Las Vegas, Nevada	MM DOCKET NO. 83-860 File No. BPH-820414AF

MCB BROADCASTING OF NEVADA, INC.[1] North Las Vegas, Nevada	MM DOCKET NO. 83-862 File No. BPH-820415AD
LAS VEGAS ELECTRONICS, INC. Paradise, Nevada	MM DOCKET NO. 83-863 File No. BPH-820415AM
NEW RADIO, INC. North Las Vegas, Nevada	MM DOCKET NO. 83-865 File No. BPH-820415AZ
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: July 7, 1986; Released: July 14, 1986

BY THE COMMISSION: COMMISSIONER DENNIS NOT PARTICIPATING;

1. Now before the Commission are Applications for Review filed by Constance J. Wodlinger (Wodlinger) on April 19, 1985; by New Radio, Inc. (New Radio) on April 19, 1985; by Silver State Communications, Inc. (Silver State) on April 22, 1985; and by Las Vegas Electronics, Inc. (Las Vegas Electronics) on June 6, 1985, with a consolidated opposition filed by Debra D. Carrigan (Carrigan) on June 21, 1985.[2] New Radio filed an opposition to the Application for Review of Las Vegas Electronics on June 21, 1985.

2. Five of the captioned applicants specified North Las Vegas and one specified Paradise, Nevada as their proposed communities of license, and an issue was designated to determine which, if

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[1] MCB Broadcasting of Nevada, Inc. did not file an Application for Review. Accordingly as to MCB the Review Board's Decision denying its application has become final.

[2] In comments filed May 6, 1985, Las Vegas Electronics requested deferral of all applications for review pending the Review Board's disposition of its outstanding Petition for Reconsideration. By *Order*, 101 FCC 2d 218 (1985), the Board denied reconsideration, thereby mooting the deferral request of Las Vegas Electronics.

either, of the specified communities was entitled to a dispositive preference under Section 307(b) of the Communications Act. In an Initial Decision, 100 FCC 2d 741, released September 4, 1984, the presiding Administrative Law Judge concluded that the communities of North Las Vegas and Paradise were separate communities for Section 307(b) purposes. He further concluded that Paradise had a greater need for a new station and granted the application of Las Vegas Electronics, the only party specifying Paradise as its proposed community of license.

3. On exceptions, the Review Board concluded that as between Paradise and North Las Vegas, no dispositive 307(b) preference was warranted, *Debra D. Carrigan*, 100 FCC 2d 721. The Board reasoned that both Paradise and North Las Vegas were integral parts of the dominant Las Vegas metropolitan area and that all the applicants for the Class C regional facility proposed to use the same transmitter site and would bring service to the same geographic areas and populations. Since no meaningful 307(b) distinction existed between the applicants, the Board turned to the contingent standard comparative issue to determine which applicant was best qualified. Upon its examination of the record, as supplemented by oral argument, the Board granted the application of Debra D. Carrigan. In their applications for review the parties have raised a number of questions concerning the Board's decision which warrant discussion.

Section 307(b)

4. Section 307(b) of the Communications Act requires the Commission "to provide a fair, efficient and equitable distribution of radio service . . . among the several States and communities." A community demonstrating the greatest need for a new broadcast service is generally entitled to a dispositive preference. *FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 361–362 (1955). Applicants for the less favored community are entitled to no comparative consideration. As the Board observed, "[o]ver the years the Commission has employed a variety of complementary policies seeking to effectuate the Congressional intent embodied in § 307(b)." 100 F.C.C. 2d 721 (¶5). The Board's thorough discussion of the development of these policies (¶¶5–15) is both an accurate and helpful analysis that we specifically endorse.

5. Moreover, we affirm the Board's conclusion that the *Huntington* doctrine is not defunct.[3] We note in this regard that

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[3] *Huntington Broadcasting Co.*, 14 F.C.C. 563 (1950), *aff'd*, *Huntington Broad-*

the Court of Appeals in a recent opinion has reached a similar conclusion, citing with approval the Board's analysis below. *See Beaufort County Broadcasting Co.* v. *FCC*, ___ F.2d ___, ___ n.6 (D.C. Cir. 1986) slip opinion at 16 n.6. Both the Board and the court correctly concluded that the *Huntington* doctrine remains a viable Commission policy that has not been vitiated by our 1983 elimination of the Suburban Community and related Section 307(b) policies.[4] Our Report and Order on the Suburban Community Policy primarily addressed the anticompetitive impact of those outdated doctrines.[5] We eliminated those policies that had the effect of inhibiting the filing and granting of applications for suburban communities. In contrast, the *Huntington* doctrine has been relied on to expand the choice among applicants. Under the *Huntington* doctrine the intent of an applicant for a suburban community is not questioned and that applicant is given equal consideration under the comparative issue. With specific reference to the facts of this case, the Board properly applied the established criteria to conclude that this is a "classic" case for application of *Huntington.* (¶21) As the Board found, the *Huntington* doctrine is applicable in this case because: (a) the facility in issue is a Class C station intended to provide a regional service; (b) all of the applicants have similar technical proposals and would provide service to virtually identical areas and populations; and (c) the communities of Paradise and North Las Vegas are integral parts of a homogeneous metropolitan area and share common needs and interests.[6] Here, a grant of any of the competing applications will bring service to both communities. Since both communities are segments of a common metropolitan area and since all of the applicants will serve the shared needs of

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casting Co. v. *FCC*, 192 F.2d 33 (D.C. Cir. 1951). "The *Huntington* doctrine, in 'exceptional' circumstances, has justified the Commission's setting aside a 'determinative' section 307(b) issue, such as the first transmission preference, by treating politically separate entities as one." *Beaufort County Broadcasting Co.* v. *FCC*, ___ F.2d ___, ___ (D.C. Cir. 1986) slip 14.

[4] *See Suburban Community Policy*, 93 F.C.C. 2d 436 (1983), *aff'd. Beaufort County Broadcasting Co.* v. *FCC*, ___ F.2d ___.

[5] *See Hispanic Owners, Inc.*, FCC 86-316, adopted July 7, 1986.

[6] Application of the *Huntington* doctrine based on these sorts of factual determinations is consistent with the doctrine's purpose. The Court of Appeals described that foundation: "Underlying the Commission's original decision to adopt the *Huntington* policy exception was an assumption that the overlapping transmission needs of the central city and contiguous suburban communities, along with the multiplicity of available radio outlets in the typical metropolitan area, would lead in the aggregate to the satisfaction of a given community's needs for local self-expression." *Beaufort County Broadcasting*, ___ F.2d at ___ (slip 18).

both communities, there is no basis for making a dispositive Section 307(b) determination.[7] Accordingly, the applicant for Paradise is entitled to comparative consideration, along with the other mutually exclusive and qualified applicants in this proceeding.

Standard Comparative Issue

6. With respect to the standard comparative issue, three parties (New Radio, Silver State and Wodlinger) challenge the adequacy of the facts supporting the Board's conclusion that Carrigan is the preferred applicant. By way of background, the ALJ made extensive findings of fact on both the 307(b) issue and the contingent standard comparative issue. Since he decided the case on 307(b) grounds, however, he did not find it necessary to reach any conclusions regarding the standard comparative issue, other than in a perfunctory footnote (I.D. 100 FCC 2d 759 n.23). The Board reversed the ALJ on the 307(b) issue and found Carrigan the comparatively superior applicant. However, the Board did so without referring to the specific facts underlying its ultimate conclusion. We therefore find it necessary to set out those findings which form the basis for grant of the Carrigan application.

7. Turning first to the question of diversification, the ALJ found that Silver State, New Radio and Debra Carrigan had no attributable ownership interests in any media of mass communications (I.D. para. 27). He further found that Constance Wodlinger and Las Vegas Electronics had ownership interests in other media of mass communications (I.D. paras. 28–30), but that Las Vegas Electronics would divest itself of its broadcast holdings if granted the construction permit in this proceeding (I.D. para. 29 and n.25). Based on these findings we conclude that Silver State, New Radio, Las Vegas Electronics and Carrigan merit a significant comparative preference under this criterion. A grant to any of these applicants would better promote our policy of maximizing diversification of control and ownership of mass media than would a grant of Wodlinger's application.

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[7] In affirming the Board's Decision, we agree with the assessment that the previous allocation of a TV channel to Paradise is irrelevant to the decision to be made regarding allocation of the subject contested FM channel. *See Debra D. Carrigan*, 101 FCC 2d 218 (1985) (Order denying petition for reconsideration).

8. We turn next to the question of which applicant will provide the best practicable service. This factor is a composite of a number of variables. The most important of these is integration of ownership and management. Relevant considerations are the proportionate share of the individual owners/participants involved, the amount of time such owners will be dedicating to the day-to-day operations of their stations, and the nature of the work to be performed on behalf of the stations. Primary emphasis is placed on full time participation. To the extent that the time spent moves away from full time, the credit will drop sharply. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). We are also concerned with the "positions which the participating owners will occupy, in order to determine the extent of their policy functions and the likelihood of their playing important roles in management." *Id.*

9. With regard to this factor, the ALJ found that Ms. Carrigan is a sole proprietor, will be working full time for the station, will serve in the capacity of General Manager and that part of her time will be devoted to matters affecting sales (I.D. paras. 21, 32). Based on the above, the Board concluded that Carrigan was entitled to 100% integration credit (Rev. Bd. Dec. paras. 24, 25).[8] The Board rejected the contention that the sales related activities of Carrigan detracted from her claimed full time participation. The Board ruled that such activities are an integral part of the operation and management of the proposed station (Rev. Bd. Dec. para. 25). In any event, the position of sales manager is recognized as a managerial job by the *Policy Statement, supra*, and has been accorded full integration credit on a number of occasions, even when significant sales activities have accompanied the sales supervision. *Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 726, *review denied*, FCC 85-104 (1985). Based on the fact that Carrigan's 100% owner will function in a full time managerial position we conclude that this applicant is entitled to 100% integration credit.

10. Of the remaining four applicants, only New Radio evidenced a comparable integration showing. All four of that applicant's owners were credited with full time participation in management type positions (I.D. paras. 72, 81, 86, 92 and 94). As to the other applicants, the ALJ found that Constance Wodlinger is also a sole proprietor (I.D. para. 22). However, since she would not be

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[8] The separate statement of Board Chairman Marino contained a numerical comparative analysis of the applicants. In its Decision the Board concurred with this analysis (Rev. Bd. Dec., 100 FCC 2d at 739 n.57).

working full time on behalf of the station or holding a management type position (I.D. para. 36), she is not entitled to any integration credit. Las Vegas Electronics is owned by two stockholders, both of whom will participate in the operation and management of the station. However, they propose to devote only 20 hours per week to station matters (I.D. paras. 64-65, 69). Hence, the integration credit earned by this applicant is significantly reduced by this lack of full-time participation.

11. As to Silver State, the ALJ found that this applicant is owned by six individuals each holding an equal percentage of stock (I.D. para. 41). Although all six proposed to work full time on behalf of the station, the ALJ found that two of them (William W. Brown and Louis A. Tabat) would not be holding management type positions (I.D. paras. 51, 56 and 57). The Board agreed that no integration credit could be accorded Silver State for these two stockholders. On examination of the record, we similarly conclude that there are no specifics explaining how Tabat and Brown will be involved in policy type activities at the station.[9] *Cf. Minority Broadcasters of East St. Louis, Inc.*, 99 FCC 2d 264, 267-268, (Rev. Bd. 1984), *modified in part*, 57 Rad. Reg. 2d (P&F) 1390 (1984), *appeal pending*. From all appearances Brown and Tabat will simply be performing in a liaison capacity, maintaining contacts in the community and reporting to the other owners who have programming authority. Such duties fall short of the type of activities meriting integration credit. *Grand Broadcasting Co.*, 36 FCC 925, 2 Rad. Reg. 2d (P&F) 327, 341 (1964).[10]

12. We, therefore, conclude that only the Carrigan and New Radio applications are entitled to 100% integration credit for the full time participation of all of their principals in management type positions. This quantitative superiority cannot be offset by any qualitative enhancement credits accruing to Silver State, Wodlinger, or Las Vegas Electronics. For, although "qualitative attributes of participating owners may increase of enhance the value of an integration proposal, [they] may not overcome a clear quantitative difference." *New Continental*, 88 FCC 2d 830, 850

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[9] Tr. 382-391, 525-526, 554-558; Silver State Exs. 5 and 7; Silver State Proposed Findings of Fact and Conclusions of Law filed July 1, 1984, p.12.

[10] Given Carrigan's qualitative superiority over Silver State, resolution of the question of whether Silver State should be credited with the full time participation of a third stockholder (Lula Williams) is not decisionally significant. However, we agree with the separate statement of Board Chairman Marino that the post designation involvement of Ms. Williams constituted an impermissible comparative upgrading, for which no credit should be given. *Central Texas Broadcasting Co.*, 90 FCC 2d 583, 590 (Rev. Bd. 1982), *review denied*, FCC 83-415, released September 21, 1983.

(Rev. Bd. 1981), citing *Van Buren Community Services, Inc.*, 87 FCC 2d 1018 (Rev. Bd. 1981). This quantitative disparity places Silver State, Wodlinger, and Las Vegas Electronics at a decisively inferior position when compared to the proposals of New Radio and Carrigan.

13. We turn now to the relevant qualitative enhancement factors in this case. These factors are local residence, involvement in local civic activities, and past broadcast experience. Again, we note that the Administrative Law Judge made discrete findings pertaining to all such factors.[11]

14. We start with the basic premise that qualitative credit is proportionate to quantitative ownership. This means, for instance, that if a full time single proprietor is a local resident, that applicant is entitled to 100% enhancement credit for local residency. If an applicant were comprised of four equal full time integrated principals, but only two of those are local residents, this particular applicant would be entitled to only 50% enhancement credit. In this proceeding, the sole proprietor of the Carrigan application has resided in Las Vegas since 1971 (I.D. para. 32). Of New Radio's four principals, only two, holding a combined 51% ownership interest, demonstrate a comparable period of residency (I.D. paras. 74 and 82). The remaining two stockholders have lived in Las Vegas from only 1980-1983 (I.D. para. 87). Based on these facts Carrigan enjoys a 100% to 51% enhancement superiority over New Radio for local residence.

15. Carrigan also demonstrates greater enhancement credit under the qualitative factor of civic participation. Carrigan has been civically active within the proposed service area since 1978 (I.D. para. 35).[12] In comparison, only two of New Radio's four

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[11] The ALJ also made findings relating to female ownership, crediting Carrigan with 100% female ownership and New Radio with 51% female ownership. However, the policy of awarding integration credit for female ownership is presently under challenge before the U.S. Court of Appeals, D.C. Circuit. *Steele* v. *FCC*, 770 F.2d 1192 vacated Oct. 31, 1985. Since Carrigan prevails under the other qualitative factors, it is unnecessary to consider female ownership in this case.

[12] The ALJ rejected New Radio's version of the facts regarding the initiation of Carrigan's civic involvement. He found that these activities stemmed from 1978, not from 1982, as claimed by New Radio. New Radio's contention is based on an uncorrected copy of Carrigan's Hearing Exhibit 1. As previously explained by Carrigan, the correct dates were provided for the record at the time the exhibit was submitted into evidence (Reply to Exceptions filed with the Review Board on November 2, 1984). None of the other parties have challenged this particular finding and New Radio has provided no independent evidence indicating that the earlier date is incorrect. Accordingly, we agree with the ALJ's finding that Carrigan's participation in civic activities began in 1978.

stockholders evidenced extensive involvement in civic activities. (I.D. paras 79-80, 85). A third New Radio stockholder also claims credit under this criteria. Yet, even if so credited, the proportionately greater percentage (100% to 74.5%) of integrated ownership merited by Carrigan would entitle her to a comparative preference over New Radio.

16. The last qualitative enhancement factor considered by the ALJ is the degree of past broadcast experience. Carrigan has been involved in broadcast station matters since 1973 with her primary responsibilities falling under the area of sales (I.D. para. 34). New Radio is in turn credited with past broadcast experience deriving from three of its four principals. Most notable is the extensive broadcast experience of Lamar Marchese and Gale Gilbreath (I.D. paras. 76-78, 88-91). Credit is also awarded for the past broadcast experience of Patricia Marchese (I.D. para. 82), but none for the remaining New Radio principal, Cathie Gilbreath (I.D. para. 93). Based on the above, Carrigan again demonstrates a higher percentage of integrated owners possessing the enhancement factor of past broadcast experience.

17. To summarize, the principal of the Wodlinger application has ownership interests in other mass media properties, and is therefore comparatively inferior to the other applicants. Of these others, only Carrigan and New Radio demonstrate 100% integration of management in policy making positions, entitling them to a comparative preference over Silver State and Las Vegas Electronics. As between Carrigan and New Radio, the findings showed, and the Board so concluded, that Carrigan's integration proposal was qualitatively superior in all three areas of comparison: local residence, past broadcast experience, and civic activities. Based on the totality of the circumstances the Review Board therefore granted the application of Debra D. Carrigan and denied the mutually exclusive applications of New Radio, Silver State, Wodlinger, and Las Vegas Electronics. We concur.

18. ACCORDINGLY, IT IS ORDERED, That the Applications for Review, filed April 19, 1985 by Constance J. Wodlinger, and by New Radio, Inc.; April 22, 1985 by Silver State Communications; and June 6, 1985 by Las Vegas Electronics, Inc. ARE DENIED.

19. IT IS FURTHER ORDERED, That the denial of the application for a construction permit filed by MCB Broadcasting of Nevada, Inc. (BPH-820415AD) HAS BECOME final and that

its application is HEREBY DELETED from the caption of this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Digital Transmission
Reconsideration, Petition for, Denial of

Memorandum Opinion and Order adopted denying Associated Information Services Corporation's petition for reconsideration of the Commission's Report and Order amending its rules to implement a lottery system. Action taken in part as a result of the Commission's determination that the petitioner merely restates objections to the lottery procedures that were considered in the original proceeding and are therefore not proper subjects for reconsideration.
—*Digital Electronic Message Service*
CC Docket No. 85-40

FCC 86-175

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Parts 1 and 21 of the Commission's Rules to Establish Procedures for Processing Mutually Exclusive Applications for Digital Termination Systems in the Digital Electronic Message Service	CC Docket 85-40

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1986; Released: April 17, 1986

BY THE COMMISSION:

1. In a *Report and Order* (R&O)[1] adopted October 15, 1985 the Commission amended its rules to implement a system of random selection (lotteries) to select permittees from among mutually exclusive applications for common carrier digital termination

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[1] Amendment of Parts 1 and 21 of the Commission's Rules to Establish Procedure for Processing Mutually Exclusive Applications for Digital Termination Systems in the Digital Electronic Message Service, 50 Fed. Reg. 45608 (November 1, 1985) (hereinafter Report and Order (R&O)).

systems (DTS) in the Digital Electronic Message Service (DEMS).[2] Before us is a petition for reconsideration of that decision filed by Associated Information Services Corporation (Associated).[3] The petitioner seeks to modify the decision in the *R&O* that permits consolidation of mutually exclusive 18 GHz DTS applications in multiple Standard Metropolitan Statistical Areas (SMSAs) into one lottery. No comments were filed in response to the petition. For the reasons discussed below, the petition is denied.

BACKGROUND

2. DEMS is a common carrier radio service in the 10 and 18 GHz bands that provides end-to-end transmission of digitally encoded information. A DEMS network consists of one or more DTS for local distribution, interconnected by some form of inter-city digital transmission facility such as terrestrial microwave or satellite links.[4] There are two types of DEMS networks. An extended DEMS network consists of commonly owned, managed, and interconnected DTS facilities in at least 30 SMSAs.[5] A limited DEMS network can consist of DTS facilities in as few as one SMSA.[6] When an applicant applies for authorization for a DTS in a given SMSA, that applicant is, in essence, applying for an administrative franchise for exclusive use of a pair of channels (one for the nodal station and one for the user stations) throughout the SMSA.[7]

3. Applications for DTS may be mutually exclusive in one of two ways. An application for a new station within 50 miles of a previously proposed station may be mutually exclusive if it is timely filed and the applicant cannot satisfactorily show that no

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[2] DEMS is a common carrier radio service regulated under Part 21 of the Commission's Rules. *See* Amendment of Parts 2, 21, 87 and 90 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to, the Use of Radio in Digital Termination Sys. for the Provision of Digital Communication Servs. (hereinafter DEMS Order), 86 F.C.C. 2d 360 (1981), *modified*, 90 F.C.C. 2d 319 (1982), *further modified*, 54 Rad. Reg. 2d (P&F) 1091 (1983), *petition for review dismissed sub nom.*, Alascom, Inc. v. FCC, 727 F.2d 1212 (D.C. Cir. 1984), *further modified*, 49 Fed. Reg. 37,760 (September 26, 1984).

[3] Associated, an extended network applicant in the 18 GHz band, was a party in the original proceeding.

[4] 47 C.F.R. § 21.2 (definition of Digital Electronic Message Service).

[5] 47 C.F.R. § 21.2 (definition of Extended Network).

[6] 47 C.F.R. § 21.2 (definition of Limited Network).

[7] This exclusive franchise is subject to the requirement that the licensee not interfere with adjacent channel use or with co-channel use in an adjacent SMSA. *See* 47 C.F.R. § 21.504.

harmful interference will result to the previously proposed station.[8] Mutual exclusivity may also occur when more than one applicant has applied for the same channel pair in a given SMSA.[9] In either case the applications are mutually exclusive on a DTS-by-DTS basis, not a network-by-network basis.

4. Under the lottery procedures adopted in the *R&O*,[10] all mutually exclusive DTS applications that are acceptable for filing will be included in a lottery. The lotteries will result in applications being selected in rank order. If the first ranked tentative selectee is subsequently approved, the alternate applications will be examined in rank order to determine which must be dismissed and which, if any, can be granted. In this way, each lottery will resolve the maximum number of mutual exclusivity conflicts.

5. The *R&O* also adopted two additional procedures to facilitate conflict resolution under the lottery process. To encourage pre-lottery settlements, settling parties will have the cumulative number of chances in a lottery that they would have had absent settlement.[11] Applicants who settle after the issuance of a lottery designation will have the settlement formally acted upon after the lottery and will select one application for processing.

6. The adopted rules also allow for the consolidation into a single lottery of mutually exclusive applications in multiple SMSAs.[12] This procedure would be used only where there is an identity of extended network applicants in those SMSAs, and it would result in the selection of one permittee or licensee for all of the service areas involved. In adopting the procedure, the Commission found such action was warranted by the requirement that extended network applicants provide service in at least 30 SMSAs.[13] Without consolidation, there would be no assurance that any such applicants would meet the minimum service requirement, thus potentially rendering city-by-city lotteries a

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[8] 47 C.F.R. § 21.504(c). This may be referred to as electrical mutual exclusivity. If the application is not timely filed, then the failure to make the non-interference showing will result in the application being returned as unacceptable for filing.

[9] This may be referred to as administrative mutual exclusivity.

[10] *See* 47 C.F.R. §§ 1.825, 21.33(b).

[11] Report and Order, 50 Fed. Reg. at 45613, para. 27.

[12] 47 C.F.R. § 21.33(b) provides in part:

> If an identity of extended network applicants have mutually exclusive applications in more than one service area, these applications *may be* consolidated for the purpose of conducting one random selection procedure to select one permittee or licensee for all of the service areas involved. (emphasis added).

[13] Report and Order, 50 Fed. Reg. at 45613, para. 16.

meaningless exercise.[14] Consolidation would also promote processing efficiency.[15]

7. In its petition for reconsideration, Associated argues that the Commission did not sufficiently demonstrate that its decision to allow consolidation of extended network applicants in the 18 GHz band would be in the public interest. In particular, Associated claims that the *R&O* did not address two issues raised by several commenters in the rulemaking proceeding: that consolidation would undercut competition in DEMS,[16] and that the procedure unfairly disadvantages applicants who took the lead in applying for DEMS authorizations and, as a result, are involved in mutually exclusive conflicts. Associated also argues that consolidation will result in significant burdens without corresponding benefits to 18 GHz applicants, and it will not achieve processing efficiencies because of its probable low incidence of use.[17] The central premise underlying Associated's arguments for reconsideration is its belief that, although consolidation may be necessary to preserve the differences between extended and limited networks in the 10 GHz band, those differences do not exist in the 18 GHz band.[18]

DISCUSSION

8. In rulemaking proceedings, a petition for reconsideration is to state with particularity the respects in which the action taken should be changed. 47 C.F.R. § 1.429(c). Under established rule and case law, petitions for reconsideration are not granted to renew debate on issues fully considered and substantively re-

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[14] The *R&O* noted that under current practice extended network applicants that do not have at least 30 uncontested applications have not been granted any authorizations because we have no assurance that they will meet the 30 SMSA minimum. 50 Fed. Reg. at 45613 n. 48.

[15] *Id.* at 45612, para. 24.

[16] Competition would be hampered, Associated argues, because consolidation, which would award several SMSAs to one applicant, would limit overall the number of DEMS participants. Without consolidation, each of the mutually exclusive applicants involved would probably be chosen as tentative selectees for one or more SMSAs. Petition at 2–3.

[17] The petitioner notes that mutual exclusivities based on potentially harmful electrical interference cannot readily be consolidated, thereby limiting the procedure's application to only administrative mutual exclusivities. Also, consolidation of 18 GHz applicants can be easily defeated if one extended network applicant reconfigured its proposal as a limited network or networks, since limited network applicants are not subject to consolidation under the adopted rule. Petition at 5–9.

[18] Petition at 4–5, 9.

solved.[19] Nor are they granted if they fail to cite errors or ommissions in our decision so material that they would alter our conclusion.[20] For instance, petitions may rely on facts not previously presented to the Commission only under very limited circumstances. 47 C.F.R. § 1.429(b). In this regard, the arguments before us fail.

9. In the original proceeding, as here on reconsideration, Associated argued against consolidation for 18 GHz applicants by contending that it undercut the Commission's pro-competitive policy for DEMS and was unfair to early-filing applicants. Both of these arguments were premised, as they are here on reconsideration, on a belief that there are no significant differences between extended and limited network applicants in the 18 GHz band. We specifically considered and rejected that premise in the R&O.[21] Although there are different channel eligibility requirements in the 10 GHz band, it is established policy that all other network requirements apply equally to the 10 and 18 GHz bands.[22] To the extent that Associated's petition here rests on this premise, it merely restates objections to the lottery procedures that were duly considered in the original proceeding and, thus, these objections are not proper subjects for reconsideration. Furthermore, even devoid of the underlying premise, Associated's fairness and competition arguments do not provide sufficient cause to reconsider our decision to use consolidation. The claim that consolidation unfairly disadvantages early-filing applicants is based on the assumption that those 18 GHz applicants who filed early are more likely to be involved in mutual exclusivity conflicts than those applicants who filed after public notices were released

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[19] *See* Regulatory Policy Regarding the Direct Broadcast Satellite Service, 53 Rad. Reg. 2d (P&F) 1637 (1983); WWIZ, Inc., 37 F.C.C. 685 (1964), *aff'd. sub nom.*, Lorain Journal Co. v. FCC, 351 F.C.C. 2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

[20] *See* Employment Practices of Stations — Charlotte, N.C. Market, 77 F.C.C. 2d 1 (1980); WEOK Broadcasting, 4 Rad. Reg. 2d (P&F) 503 (1965).

[21] 50 Fed. Reg. at 45613, paras. 25-26. The *R&O* also addressed the argument that consolidation would undercut competition in DEMS as raised by another commenter, Bypass Telecommunications, Inc. Bypass contended that smaller companies would be disproportionately hurt because larger companies with more pending applications could lose consolidated lotteries and still have at least 30 other proposals to form an extended network. The *R&O* rejected this assertion as unsubstantiated and noted that SMSAs are not necessarily interchangeable for network planning purposes. *Id.* at 45612-13, para. 24 & n. 45.

[22] *See* Establishment of Spectrum Utilization Policy and Amendments to Commission Rules regarding Digital Termination Systems, 49 Fed. Reg. 37760, 37771 (Sept. 26, 1984).

that identified the already applied for channels and SMSAs.[23] No evidence is offered to support this assumption, and, in fact, all of the 18 GHz channels are involved in mutual exclusivity conflicts in the major markets.[24] In addition, Associated's characterization of the Commission's pro-competitive policy for DEMS is not accurate. A pro-competitive policy has been espoused mainly in support of network development concepts and not to justify an overall increase in the number of DEMS participants *per se*.[25]

10. Associated also argues that reconsideration is warranted because the consolidation procedure, which it believes will entail significant burdens, will not actually achieve processing efficiencies due to its probable low incidence of use. Associated cites factors not previously addressed in this proceeding that will limit use of the procedure.[26] The *R&O* acknowledged that the incidence of use would be limited because it required a precise identity of applicants.[27] Although we agree with Associated that several factors will limit use of the procedure, these factors do not categorically defeat the procedure's utility. Because use of the procedure is discretionary,[28] the rule need not be modified in light of additional limiting factors. Furthermore, to the extent that DEMS applicants propose to develop network services, consolidation is only one means of helping applicants achieve their service goals. An applicant also may want to rely on settlements in some SMSAs or to reconfigure its pending applications into a limited network or networks[29] if these methods provide it with greater assurance that it will meet its goals. Although applicants' reconfiguration of their pending applications into limited network

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[23] Petition at 3.

[24] Mutual exclusivity occurs because under the rules other parties interested in acquiring the same frequencies as the first filed applicant may file competing applications within 60 days of public notice of the first application's filing. 47 C.F.R. § 21.31. It is not the result of consolidation.

[25] *See, e.g.*, DEMS Order, 86 F.C.C. 2d 360, 368–69 (1981) (allowing for limited networks because of high entry barriers for extended network status); BTV Digital Services, Mimeo No. 6262 at 6 n. 10 (Common Carrier Bureau, released Aug. 8, 1985) (competition is promoted by granting a second channel to a limited network applicant demonstrating demand for its service and not merely by allowing for a number of DTS carriers in a market).

[26] *See supra* note 17.

[27] 50 Fed. Reg. at 45613, para. 26.

[28] *See supra* note 12.

[29] Amending of network proposals was a suggested alternative mentioned in the *R&O* for 18 GHz applicants. 50 Fed. Reg. at 45613, para. 26. This process may not be available to 10 GHz applicants because of channel eligibility restrictions.

proposals would further limit the incidence of consolidation,[30] consolidation may be useful in resolving conflicts between competing applicants that are committed to developing extended networks. For these reasons, we do not believe that Associated's argument here warrants modification of our decision to allow for consolidation of extended network applicants.

CONCLUSION

11. Accordingly, for the reasons discussed above, IT IS ORDERED that Associated's petition for reconsideration is DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[30] Because limited network applicants would not be subject to consolidation, those conflicts involving both extended and limited applicants would not be consolidated.

Rules, Waiver of, Denied
Short Spacing

Memorandum Opinion and Order **adopted denying Wood River Public Broadcasting Corporation's request for waiver and retaining its application for a construction permit for a new FM station to serve Sun Valley, Idaho. The Commission feels that Wood River's argument for a spacing waiver is not directed toward service to Sun Valley nor has it satisfied the threshold test for a spacing waiver.**

—Donovan Burke

FCC 86-180

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
DONOVAN BURKE	File No. ARN-850712MR
and	
WOOD RIVER PUBLIC BROADCASTING CORPORATION	File No. ARN-850712YC
For Construction Permit For a New FM Station to Serve Sun Valley, Idaho	

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 1986; Released: April 18, 1986

BY THE COMMISSION:

1. The Commission has before it two mutually exclusive applications for construction permit for a new Class A FM station to serve Sun Valley, Idaho, on Channel 237. These applications were filed on July 12, 1985 by Donovan Burke ("Burke") and Wood River Public Broadcasting Corporation ("Wood River"), respectively. Burke has proposed a fully-spaced transmitter site, but

Wood River's site is short-spaced to Class C FM Station KEZJ, Twin Falls, Idaho, which operates on Channel 239.[1] Wood River accordingly seeks waiver of 47 C.F.R. § 73.207.

2. In support of this waiver Wood River claims that: (i) the short spacing proposed is "only 0.6 miles [or 0.9 km and that in the past] the Commission has routinely granted short-spacing waivers of up to one mile;" (ii) "no other site will provide comparable coverage;" (iii) [o]ther sites would require higher development costs;" and (iv) "interference to KEZJ would be minimal."

3. We note that, where there was no mutual exclusivity, we have waived similar amounts of short spacing in the past. *Williams County Broadcasting System, Inc.*, 27 RR 2d 158 (1973); *Radio Station WKDO*, 37 RR 2d 1485 (Broadcast Bur. 1976); *Patterson Broadcasting Co.*, 45 RR 2d 120 (1979). A different result has been reached in mutually exclusive cases, however. In both *Trend Broadcasting, Inc.*, 18 FCC 2d 749 (1969) and *Nelson County Broadcasting Co, Inc.*, 64 FCC 2d 932 (1977), applicants whose proposed spacing deficiencies were of the magnitude involved in this case sought to justify their respective waiver requests by claiming that their stations would benefit from economies of development and operation if they were permitted to locate their transmitters at short-spaced sites. Their justifications were found insufficient. In this instance, Wood River has failed to satisfy the threshold test for a spacing waiver, *i.e.*, that no fully spaced (or lesser short-spaced) sites exist. *Townsend Broadcasting Corp.*, 62 FCC 2d 511 (1976); *Megamedia*, 67 FCC 2d 1527 (1978). A fully-spaced site obviously exists, given Burke's application, but Wood River has raised no question about its availability or technical feasibility.

4. Also, Wood River's coverage argument is not directed toward service to Sun Valley, the principal community proposed to be served. A claim of poor coverage must ordinarily be directed to a failure to serve that community adequately. *Greater Media, Inc.*, 61 FCC 2d 692 (1976). When a coverage-related argument does not speak to the principal community to be served, the applicant must show that the target area either lacks service or is underserved. *Stoner Broadcasting System*, 35 RR 2d 332 (1975);

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[1] Per 47 C.F.R. § 73.207, Class A and Class C stations two channels removed must be geographically apart at least 105 km. Wood River states that its proposed site is only 0.9 km short-spaced to KEZJ. Our review indicates that the actual spacing deficiency is 1.4 km. [However, by operation of 47 C.F.R. § 73.208(c), both values round off to 1 km.]

Fort Myers Broadcasting Co., 77 FCC 2d 863 (1980). Wood River has not done this. For all of these reasons, then, its waiver request must be denied.

5. Having concluded that Wood River's waiver should be denied, we must determine whether a curative amendment to specify a fully spaced site should be allowed in the FM service. Wood River's application was filed after adoption of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), which revised the FM processing Rules. Prior to adoption of that *Report and Order* at least one applicant would in some instances — as here — propose a fully-spaced transmitter site, but another applicant would propose a short-spaced site. Unless the short-spaced applicant requested waiver of § 73.207, the Commission would not accept its application for filing.[2] If the applicant filed a timely petition for reconsideration and either (a) raised a substantial and material question of fact concerning the technical feasibility or availability of all of the other applicants' fully-spaced sites, or (b) submitted a curative amendment, the application would be reinstated *nunc pro tunc*. Where the applicant at the outset or on reconsideration raised the requisite question as to the availability or feasibility of any and all full-spaced sites, an appropriate short-spacing issue would be specified in the Hearing Designation Order. *See, e.g., Clearlake Broadcasting Company*, 47 Fed. Reg. 47931 (1982).

6. Where the short-spaced party requested waiver but failed to raise a substantial and material question of fact concerning all fully spaced sites, the Commission would send a "*Trend*" letter. *See Trend Broadcasting, supra; Nelson County, supra*. In *Trend Broadcasting*, the Commission established the unique practice of holding the short-spaced application for a period of 30 days after notifying the applicant that a waiver of the FM spacing rules is not warranted when at least one applicant for the same channel specifies a fully-spaced site. Within this 30 day period, the applicant could file a predesignation amendment specifying a fully-spaced site. If the applicant failed to file a curative amendment within 30 days, the application would be denied further consideration in the comparative proceeding. *See, e.g., North Texas Media, Inc.*, FCC 84-456, Mimeo 35015 (released October 5, 1984), *aff'd*, No. 84-1511, slip op. at 11 (D.C. Cir. 1985).

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[2] Per 47 C.F.R. § 73.3566(a), only where accompanied by a request for waiver can a short-spaced application be acceptable for filing. Absence of such a request results in the application's return as unacceptable for filing.

7. Given the changes adopted in the *Report and Order* in MM Docket 84-750, *supra*, we believe the practice of sending *Trend* letters is no longer appropriate. Under the new "window" processing system, an applicant is provided a 30-day period within which to perfect its application's acceptability for filing. (Acceptability requires compliance with our technical rules for FM stations. *Id.* at Appendix D.) This 30-day period is triggered by the application's appearance on a Public Notice as an application accepted for tender. Afterward, the filing of amendments is severely constrained. *Id.* at para. 31. These constraints are set forth in 47 C.F.R. § 73.3522(a)(6), which appears at para. 3, Appendix A, to the *Report and Order*:

> . . . [Commerical FM applications] may be amended as a matter of right during the appropriate [filing] window . . . . For a period of 30 days following the . . . issuance of a Notice of Tenderability announcing the acceptance of the applications [for tender], amendments that go to the acceptability or grantability of an application may be filed as a matter of right. Subsequent [predesignation] amendments . . . will be considered only upon a showing of good cause for late filing or pursuant to [47 C.F.R.] § 1.65 or [47 C.F.R.] § 73.3514 Unauthorized untimely amendments are subject to return by [our] staff without consideration . . . .

Thus, except in certain circumstances[3] not pertinent here, predesignation amendments going to acceptability are forbidden after 30 days from the issuance of the Public Notice announcing acceptance for tender of a given application.

8. We cannot reconcile the *Trend* letter's triggering of a further 30-day amendment period and the attendant delay in application processing with our action in Docket 84-750 which promulgated a streamlined, efficient processing system to expedite the authorization of new or expanded service to the public. *Report and Order* in MM Docket 84-750, *supra* at paras. 13, 25. Applications specifying fully-spaced sites — and that in other respects are acceptable for filing — are ready for further processing to grant or designate for hearing. We need not and should not hold such applications in abeyance and await a curative amendment from a short-spaced applicant. Such delay is inconsistent with our stated goal.

9. Where no substantial and material question of fact regarding technical feasibility or availability is raised concerning all other applicants' fully-spaced transmitter sites, a short-spaced application will not be designated for hearing with a short-spacing issue

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[3] Upon a showing of good cause; pursuant to 47 C.F.R. § 1.65, which requires prompt amendment to reflect significant changes in information previously given in an application; or upon our request pursuant to 47 C.F.R. § 73.3514.

against it. *North Texas Media, supra.* The *Report and Order* in MM Docket 84-750, *supra,* suggests that the proper course of action is to return a short-spaced application lacking a waiver request or, where present, to evaluate an application's waiver request on its merits. If the waiver request is denied and the application is returned, the application will not gain acceptance *nunc pro tunc* by filing a curative amendment. *Report and Order, supra* at para. 32. Therefore, effective upon release of this Order, an applicant who files an application which specifies a short-spaced site and is mutually exclusive with an application specifying a fully-spaced site shall no longer be afforded the 30 day curative amendment opportunity established in *Trend Broadcasting, supra.* While it is our belief that the *Report and Order, supra,* effectively eliminated the filing of all amendments after the 30 day period triggered by an application's appearance on a Public Notice announcing its acceptance for tender, we wish to take this opportunity to formally eliminate the unique practice established in *Trend Broadcasting, supra,* and, thereby resolve any potential ambiguities concerning that policy's application under the new processing rules. Accordingly, any application involving a "Trend" situation which was filed prior to the release date of this Order shall be permitted to submit a curative amendment specifying a fully-spaced site within 30 days of notice that its request for waiver has been denied.

10. Accordingly, IT IS ORDERED, That the request for waiver filed by Wood River Public Broadcasting Corporation IS DENIED and its application SHALL BE RETAINED for a period of 30 days to permit the filing of a curative amendment specifying a fully-spaced site.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Conflict of Interest
Interlocutory Ruling Appeal From

> **Review Board denies appeal and affirms ALJ's ruling disqualifying appellant's counsel from further participation in the proceeding. Counsel had simultaneously represented in another ongoing proceeding an applicant having an 18% nonvoting stockholder who also was a proposed 70% limited partner in an opponent of counsel's client in the instant proceeding. The interests of the two clients were in sharp conflict, and counsel failed to rebut the presumption that the former client had divulged confidential information which could be used against its best interests in favor of the instant client. Counsel failed to obtain the informed consent of the former client.**
>
> —*Dorothy J. Owens*
> MM Docket No. 85-267

FCC 86 R-46

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	MM DOCKET NO. 85-267
DOROTHY J. OWENS	File No. BPCT-850222KG
HAROLD L. MULLICAN, LIMITED PARTNERSHIP	File No. BPCT-850422KJ
LASH COMMUNICATIONS, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPCT-850422KK
LIBERTY BROADCASTING CORPORATION	File No. BPCT-850422KS
CROWN CITY TV, INC.	File No. BPCT-850422LA

For Construction Permit for a New
Television Station at Bakersfield,
California

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 1986; Released: July 28, 1986

BY THE REVIEW BOARD:

1. The Review Board has before it an Appeal filed June 4, 1986 by Liberty Broadcasting Corporation (Liberty), one of five mutually exclusive applicants for a new UHF television station proposed to operate on Channel 48 at Bakersfield, California. In a *Memorandum Opinion and Order*, FCC 86M-1774, released May 23, 1986 (*Order*), presiding Administrative Law Judge Joseph Stirmer (ALJ) disqualified Liberty's counsel, Seymour M. Chase and his firm, Seymour M. Chase, P.C., from further participation in this proceeding. Liberty, represented by Chase, appeals the ALJ's ruling pursuant to Section 1.301(a)(5) of the Commission's Rules, 47 CFR § 1.301(a)(5).[1] Competing applicant Harold Mullican, Limited Partnership (Mullican), opposes the appeal.

2. In his *Order*, the ALJ found that Chase, while representing Liberty in the instant proceeding, simultaneously represented Newton Television, Inc. (NTI) in another ongoing proceeding.[2] However, one of NTI's principals, 18% non-voting shareholder Dr. Sam Walters, is *also* a 70% limited partner in Liberty's (and Chase's) *opponent* here, Mullican. More specifically, the ALJ observed the following (*Order* at paras. 3-4):

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[1] Section 1.301(a)(5) provides that:

> A ruling removing counsel from the hearing is appealable as a matter of right, by counsel on his own behalf or by his client. (In the event of such ruling, the presiding officer will adjourn the hearing for such period as is reasonably necessary for the client to secure new counsel and for counsel to familiarize himself with the case).

By *Order*, FCC 86M-1735, released May 22, 1986, the ALJ continued the hearing until September 16, 1986.

[2] NTI is an applicant (File No. BPCT-850828KK) in the Newton, New Jersey comparative television proceeding (MM Docket No. 85-399) which is currently being adjudicated before Administrative Law Judge John Frysiak. The ALJ herein observed that Chase's representation of NTI apparently ended "sometime after May 10, 1986." (*Order* at n. 1).

> In an amendment filed June 7, 1985, Mullican formed a limited partnership, with one of the limited partners being Dr. Sam Walters. Mr. Chase was aware of Dr. Walters' participation in the Mullican application at least as early as November 21, 1985. (Footnote omitted). Dr. Walters was scheduled by Mr. Chase for deposition in April 1986, but at the last minute could not attend. Counsel to Mullican informed Mr. Chase at the April deposition session of Dr. Walters' nonappearance, and offered to make Dr. Walters available in Washington, D.C., at Mr. Chase's convenience. Mr. Chase subsequently asked that Dr. Walters be produced on Saturday, May 10, 1986, in Mr. Chase's office for deposition, a request with which Mullican complied.
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> At the beginning of the deposition, Mr. Chase stated on the deposition record that he had represented Dr. Walters in the filing of comments in a rulemaking proceeding in October 1985, had written to Dr. Walters repeatedly about the rulemaking and about future representation arising from the successful conclusion of the rulemaking, and had telephoned Dr. Walters without reaching him on one occasion. More important, Mr. Chase revealed that he represented Newton Television, Inc. (NTI), an applicant for construction permit for a new commercial television station in Newton, New Jersey, a proceeding presently before Administrative Law Judge John Frysiak. It is clear that Mr. Chase was aware that Dr. Walters was represented to be a non-voting shareholder of the Newton application because on October 18, 1985, Mr. Chase filed an amendment on behalf of the applicant listing Dr. Walters as an 18.67% non-voting stockholder. *It is, thus, clear that as of November 1985, Mr. Chase knew that he represented an applicant in the Newton, New Jersey proceeding which had as a principal Dr. Walters while at the same time he represented Liberty Broadcasting Corporation in the Bakersfield proceeding who had as one of its opponents an applicant (Mullican) of which the same Dr. Walters was also a principal.* (Footnote omitted); emphasis added).

3. The ALJ also correctly observed that (*Order* at para. 6; footnote omitted; emphases added):

> *As counsel for NTI, Mr. Chase has been, since the formation of that entity and at all times through at least May 10, 1986, privy to confidential information concerning Dr. Walters and his participation in that applicant.* In present day Commission practice in comparative cases, applicants are more and more structured as limited partnerships or as corporations with non-voting stockholders. Applicants such as these engender a great deal of cross-examination to determine the *bona fides* of the structure. (See, for example, *KIST Corp.*, 99 FCC 2d 173 (Review Board, 1984), *modified*, 102 FCC 2d 288 (1985)). *In order to properly represent NTI, in the Newton proceeding, Mr. Chase would have had to establish and support the claim that Dr. Walters was a true non-voting stockholder and his interest should not diminish NTI's integration. Yet, on behalf of his other client, Liberty Broadcasting Corporation, in the instant case, he would have to attempt to discredit Dr. Walters' claimed position of a true limited partner in order to diminish Mullican's integration credit.* Because Dr. Walters is a noninte-

> grated limited partner of Mullican, Liberty's decision to seek to depose Dr. Walters can presumably be ascribed to Liberty's desire to discover information demonstrating that Dr. Walters has control of Mullican inconsistent with his represented status, or that he has been or is likely to be involved to an impermissible extent with the affairs of the proposed station as an owner. *See KIST Corp.*, 99 FCC 2d 173 (Review Board, 1984), *modified*, 102 FCC 2d 288 (1985). *The conflict of interest is readily apparent and the potential compromising of Dr. Walters' secrets or those of NTI relating to Dr. Walters in the Newton, New Jersey proceeding is an obvious concern.* The possibility existed that in his cross-examination of Dr. Walters, Mr. Chase may have been required to use or disclose privileged information obtained during the course of the firm's past representation of Dr. Walters or NTI, information which it could not have obtained elsewhere.

4. In further noting that Chase was the *only* attorney in the instant proceeding seeking to take Dr. Walters' deposition (*Order* at n. 5), the ALJ found that: (1) Chase, despite his claim that he received no confidential information from Dr. Walters, had failed to rebut the presumption that he had obtained confidential information about NTI and its principal (*Order*, para. 7); (2) Chase's judgment and effective representation of Liberty would compromise NTI's (and Dr. Walters') secrets to the benefit of Liberty; and (3) that Dr. Walters and Mullican would likely be unfairly prejudiced (*Id.* at para. 9). The ALJ also rejected Chase's claim that disqualification is not now required because Chase no longer represents NTI, will not call Dr. Walters for examination, and will not cross-examine any of Mullican's principals.

5. In light of the foregoing, the ALJ concluded that disqualification of Chase was mandated by the American Bar Association's Code of Professional Responsibility disciplinary rules barring: (1) the disclosure of client confidences for the advantage of the attorney or a third person (Disciplinary Rule DR 4-101(B); and (2) acceptance or continuation of multiple employment if the exercise of the attorney's independent professional judgment on behalf of the client will be or is likely to be adversely affected by such acceptance or continuation (DR 5-105). The ALJ also concluded that Ethical Consideration 2 of Canon 9 concerning the avoidance of the appearance of impropriety supported Chase's disqualification herein.[3]

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[3] Specifically, Disciplinary Rule DR 4-101(B) directs that:

> Except where permitted under DR 4-101(C), a lawyer shall not knowingly:
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> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of

6. In Liberty's appeal, Chase, although acknowledging "that for a period of some six months there was the appearance of a possible conflict" and that he did not, in that period, either ascertain that there was no true conflict or take steps to confirm the conflict and to resolve it (Appeal at 2), avers in pertinent part that he should not be disqualified from representing Liberty because: (1) no attorney-client relationship actually existed between Chase and Dr. Walters, and the firm did not actually receive any adverse confidential information concerning Dr. Walters (*Id.* at 3-4); (2) Chase's "knowledge of [NTI's corporate] 'organization', 'structure', and 'personalities' does not justify disqualification where the knowledge 'can quickly and easily be learned through the civil discovery process' " (*Id.* at 5); (3) there is no substantial relationship between the Newton and the instant proceeding (*i.e.*, Dr. Walters putative status as a passive, non-voting stockholder in the former proceeding is wholly independent from his alleged passive, limited partner role here) (*Id.* at 5-7); (4) Chase never received any communication, written or oral, from Dr. Walters (*Id.* at 7); (5) "in the pertinent period, Walters did not have an interest in the Mullican application for Bakersfield which the Chase firm was obliged to refrain from opposing" (*Id.* at 10;

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a third person, unless the client consents after full disclosure.

Additionally, Disciplinary Rule DR 5-105 states that:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of the client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).
>
> (C) In situations covered by DR 5-105(A) and (B), a lawyer may accept multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his professional judgment on behalf of each.

Finally, Ethical Consideration 2 of Canon 9 advises that:

> EC 9-2: Public confidence in the law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client . . . When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

footnote omitted); and, (6) "Liberty is willing to dispose of whatever doubts may remain in this matter by [waiving its right to] cross examine" any of Mullican's principals and "to forego its right to offer the[ir] depositions" into evidence (*Id.* at 12-13).

7. We will deny the appeal. First, it is undisputed that Chase simultaneously represented NTI and Liberty, and that Dr. Walters was, and is, a principal, putatively passive and non-voting, in both NTI *and* Mullican (Liberty's opponent herein). NTI's comparative case will be strongest if it can demonstrate that Dr. Walters, as an alleged non-voting stockholder, is truly a non-voting and passive owner who will not participate in its proposed station's management. *See, e.g., Cotton Broadcasting Co.*, FCC 86R-42, released July 7, 1986; *Cleveland Television Corp.*, 91 FCC 2d 1129, 1139-1141 (Rev. Bd. 1982), *rev. denied*, FCC 83-235, released May 18, 1983, *aff'd*, 732 F.2d 962 (D.C. Cir. 1984).[4] Moreover, until the Commission's most recent statement in *Daytona Broadcasting* that the mass media interests of passive, non-voting owners would "be accorded non-cognizable status in the comparative hearing process," *supra* note 4, it was in NTI's best interest to assure (assuming Mullican were to obtain a final grant of a construction permit during the pendency of the Newton proceeding) that Dr. Walters' interest in Mullican also be regarded as that of a passive, non-voting owner. *See Old Time Religion House, Inc.*, 95 FCC 2d 713, 723-725 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 551, 553, and n. 2 (Rev. Bd. 1984), *review denied*, FCC 85-104 released March 5, 1985, *review of recon. dismissal dism'd*, FCC 86-165, released April 15, 1986 (final grants of construction permits are cognizable for diversification purposes). Conversely, Liberty's comparative case against Mullican would be strengthened if it could show that Dr. Walters was, in effect, a voting owner of Mullican. Indeed, Liberty makes this very allegation in its Appeal (at 12). Should Liberty

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[4] Not only is this patently clear with respect to "integration of ownership and management," a comparative factor "of substantial importance," *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965), but it was not until April 18, 1986, well after Chase knew he represented the apparently conflicting interests of NTI and Liberty (*see* Appeal at 2), that the Commission modified existing precedent to make clear that the mass media interests of a passive, non-voting principal would no longer be weighed against the applicant under "diversification of mass media control," a comparative "factor of primary significance" (*Id.* at 394). *Daytona Broadcasting, Inc.*, FCC 86-182, released April 18, 1986, at para. 7 and n. 5 (*overruling in pertinent part Cleveland Television, supra*). Therefore, the conflict of interest between Chase's dual clients ran to both of the major elements — diversification and integration — needed to resolve the ultimate standard comparative issue in each proceeding.

ultimately prevail on this point and, additionally, if NTI were to obtain a final grant of its application during the pendency of the instant Bakersfield proceeding, Mullican's comparative case would be further weakened — and Liberty's case strengthened pro tanto — by showing Dr. Walters' interest in NTI to be *other* than that of a mere passive and non-voting owner and, therefore, attributable to Mullican under the diversification factor. Thus, we conclude that the interests of NTI and Liberty were, and are, in sharp conflict with each other and that, because both proceedings are still ongoing, with the resolution of the applicants' comparative status remaining at their very core, they involve "substantially related" matters. *Government of India* v. *Cook Industries, Inc.*, 569 F.2d 737, 739-740 (2nd Cir. 1978).[5]

8. Further, and as Chase readily concedes from the finding of a conflict of interest between his client Liberty and his former client, NTI (Appeal at 1,3), the law presumes that Chase has received from each confidential information which could be used against the other. Chase urges that this "presumption" is rebuttable (*see Silver Chrysler Plymouth, Inc.* v. *Chrysler Mot. Corp.*, 518 F.2d 751, 754 (2nd Cir. 1975)), and offers as rebuttal his own declaration that he "has no confidential information from or about Walters" (Appeal at 7). However, Chase was obviously the recipient of "confidences" from NTI that he seeks to protect in this proceeding, since he concedes (Appeal at 2, emphasis added):

> The Chase firm acknowledges that for a period of some six months there was the appearance of a possible conflict and it did not, in that period, either ascertain that there was no true conflict or take steps to confirm the conflict and to resolve it. There are, of course, reasons for this, but the firm is in the unfortunate circumstance that it may not set forth these reasons and explain them, for this would require a *disclosure of confidences*, not from Walters but from another person to whom the Chase firm owes an obligation of confidence.

9. More incredibly, Chase admitted to the ALJ that, based on confidential representations made to him by another NTI principal, Chase had "some reason to believe" that Dr. Walters might not be a principal, either in Newton or in Bakersfield. Clearly, this

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[5] For other Commission examples of how two ongoing comparative cases may involve substantially related matters when common principals are involved, *see, e.g., Metro Broadcasting, Inc.*, 99 FCC 2d 688, 702 (Rev. Bd. 1984), *review denied*, FCC 85-558, released October 18, 1985 (no credit for integration proposal contingent upon outcome of another proceeding); *Houston Family Television, Ltd.*, 101 FCC 2d 661, 668-672 (Rev. Bd. 1985) (integration credit diminished because of 'gamesmanship' involving another proceeding).

statement is adverse to the best interests of Chase's former client. At a further hearing conference called by the ALJ on May 19, 1986, the following colloquy ensued (Tr. 113-118; emphases added):

[JUDGE STIRMER]: You knew that you represented or that Dr. Walters was a part of the Newton application.

[MR. CHASE]: I knew he was listed, Your Honor.

[JUDGE STIRMER]: Who listed him?

[MR. CHASE]: Who —

[JUDGE STIRMER]: Who filed the amendment listing him?

[MR. CHASE]: Oh, yes, Your Honor, let me make —

[JUDGE STIRMER]: Well, you did, right?

[MR. CHASE]: Yes.

[JUDGE STIRMER]: Then you asked for him to be cross-examined in this proceeding as a part of the Mullican application.

[MR. CHASE]: Yes.

[JUDGE STIRMER]: How could you do that?

[MR. CHASE]: I could do that, Your Honor, because — *and here I'm on tender ground* — but I could do it because —

[JUDGE STIRMER]: Now at that time you didn't know anything about Mr. Walters, what his relationship was with Newton, if any. Correct?

[MR. CHASE]: That's correct.

[JUDGE STIRMER]: But you still knew that he was listed as a member of the Newton application.

[MR. CHASE]: Yes.

[JUDGE STIRMER]: And you knew that he was a part of the Mullican application and you called him for . . . deposition.

[MR. CHASE]: Yes.

[JUDGE STIRMER]: How could you do that, Mr. Chase? Explain . . . to me please.

[MR. CHASE]: I will. I will. And I have an explanation. *I am being a little hesitant here, because in this explanation I may be obliged to disclose some confidences, and I'm reluctant to do that.* But if Your Honor will accept my statement and relieve me of any burden about disclosing confidences —

[JUDGE STIRMER]: I can't relieve you of that. You have an obligation not to. *And that's precisely the reason for these rules that we have as professional lawyers. We have a Code of Ethics by which we must abide, otherwise our profession will fall into disrepute.* And that's something that I don't want to see happen, any more so than has already happened.

[MR. CHASE]: I understand, Your Honor; neither do I. I am as strong in upholding the ethics of this profession as any lawyer at this bar . . . and have been for 35 years.

[JUDGE STIRMER]: *I don't understand how you can in good conscience, Mr. Chase, stand before me and tell me you saw nothing improper about calling for deposition Mr. Walters, who is a member of the Mullican application, when you knew that he was a part of the Newton application that you represented in another proceeding.*

[MR. CHASE]: I can address that, Your Honor; I can address that, and I have to do it in two separate contexts. Okay? First, I assert again, given the acknowledgement by Dr. Walters that he didn't know that he was a principal —

[JUDGE STIRMER]: But you didn't know that.

[MR. CHASE]: That's true. That's true.

[JUDGE STIRMER]: You did not know that.

[MR. CHASE]: That's true, but the fact is there; okay?

[JUDGE STIRMER]: The fact that you didn't know it is the important criterion ethically speaking, Mr. Chase.

[MR. CHASE]: Your Honor, that may be important in terms of my conduct, but it isn't important in the terms of the question whether there is a conflict here which requires my disqualification. *Now, let me address the second half of this, and here I will be careful. I will say this to Your Honor; I had reason to believe, and I can't state what the reason is.* But I had reason to believe that there was substantial doubt as to whether Dr. Walters was, indeed, a principal in both of these applications. I had reason to believe that. Now let me cover another point.

[JUDGE STIRMER]: *How could you file an amendment with this Commission representing that he was a member of the Newton application?*

[MR. CHASE]: The reason I had for believing that came about after the filing of that amendment. Now, I would make this point, Your Honor. *The listing of a person in an application is not by any means conclusive evidence that he is, indeed, a principal and has a pecuniary interest in that application.*

[JUDGE STIRMER]: *I have never heard a more . . . outrageous remark than that, Mr. Chase. What does it mean, then?*

> [MR. CHASE]: It means simply this, Your Honor: that the fact that a person shows up in an application is not conclusive evidence that he's a principal, and I give Your Honor the point that Your Honor has observed, as I have, over the years any number of instances in which a listing —
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> [JUDGE STIRMER]: You mean you would knowingly list a person in an application when he has no interest whatsoever in that application?
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> [MR. CHASE]: Your Honor, I said before and I'll say again, I listed Dr. Walters in that application on a representation, not by Dr. Walters, but by somebody else that he had become a principal in that application. Subsequently, I was given some reason to believe — nothing concrete, nothing absolute — but some reason to believe that he might not be a principal, either in Newton or in Bakersfield.
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> [JUDGE STIRMER]: *Did you immediately remove him from that application? Did you inquire as to whether the Commission was being misled as to who the principals were in Newton?*
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> [MR. CHASE]: I made some inquiry, *and here I have to be careful again.* I made some inquiry of the person who told me that Walters was in the Newton application, and the person who also knew that Walters was being put into the Bakersfield application.

10. We note that this illuminating conference ended at 10:43 a.m. on May 19, 1986, but why these stunning revelations failed to persuade Chase to withdraw by 10:44 a.m. (or thereafter) is a mystery. Surely, Chase's admissions and his reluctance to disclose confidential facts even to support his position should have signaled this long-time member of the bar to remove himself as Liberty's counsel forthwith. *See Miller Broadcasting, Inc.*, 98 FCC 2d 725 (Rev. Bd. 1984) (Chase permitted to remain as counsel unless *actual* conflict arose). Instead, the time and resources of the Commission were further depleted by the necessity of the ALJ rendering the disqualification *Order* at issue herein, and Liberty may have been subjected to substantial additional costs as the result of the filing of Chase's lengthy, though vainglorious, appeal.[6]

11. Perhaps this proceeding is but a microcosm of the problems that appear to be growing in the noble practice of law before the Commission these days, ethical and otherwise. For example, we are, with a disturbing degree of regularity, presented with "sham" applicants, some possibly concocted by counsel. *See e.g.*,

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[6] The ALJ succinctly noted in his *Order* (note 8):

> It is unfortunate that the Presiding Judge has deemed it necessary to take this action. It is neither pleasant nor enjoyable. Indeed, it would be far more preferable for the Presiding Judge's attention to be directed to substantive and procedural, rather than ethical questions.

N.E.O. Broadcasting Co., 103 FCC 2d 1031, 1033-1036 (Rev. Bd. 1986); *Louisiana Super Comm. Ltd. Partnership*, 102 FCC 2d 1293, 1295-1297 (Rev. Bd. 1985); *Channel 63, Inc.*, 57 RR 2d 1597, 1598-1599 (Rev. Bd. 1985) (concurring statement); *Caldwell Broadcasting Corp.*, 100 FCC 2d 130, 157-159 (ALJ, 1984), *aff'd*, 100 FCC 2d 115, 126 (Rev. Bd. 1985) (by implication), *aff'd in pertinent part*, FCC 86-245, released May 15, 1986, at paras. 4-6; *KIST Corp.*, 99 FCC 2d 173, 181-189 (Rev. Bd. 1984), *aff'd in pertinent part*, 102 FCC 2d 288, 292-293 (1985). Also, the Commission's Administrative Law Judges must now regularly admonish counsel for their conduct in hearings.[7]

12. In the instant proceeding, despite Chase's blithe claim that he had received no confidential information, his own pleadings and on-record discussions with the ALJ strongly support the legal

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[7] *See, e.g., Alden Communications Corp., Memorandum Opinion and Order Granting Summary Decision in Lieu of Supplemental Initial Decision*, FCC 86M-2161, released July 2, 1986, wherein an ALJ noted (at para. 6) the following:

> One other matter has arisen during the remand proceeding. Sungilt has during this remand proceeding delayed answering interrogatories submitted by Alden. Its actions have disrupted the orderly consideration of the designated issue and abused the Commission's processes by requiring the presiding officer to repeatedly consider the impact of its uncooperative behavior. Moreover, Sungilt has engaged in repeated attacks on the Commission in its pleadings. Alden requests that these actions serve as the basis for dismissing Sungilt's application or adding an issue to determine whether it is qualified to become a licensee. In this case, Sungilt's indifference to the Commission's rules and processes does not rise to a level that would warrant disqualification or dismissal of its application. In large part this results because Sungilt has ultimately complied with discovery requests and the exuberant tenor of its pleadings appears to be due to its choice of counsel. Nevertheless, Sungilt's behavior throughout this proceeding both before the presiding officer and the Review Board does not make it a risk-free candidate for a construction permit.

Perhaps, however, there is "nothing new under the sun" concerning the arguments over ethics. Two thousand years ago, Cicero posed a question about the conduct of an Alexandrian merchant who had arrived in Rhodes during a famine with a ship laden with corn. Other ships were enroute behind him; however, the question posited was whether the merchant should reveal that other ships were on the way, or say nothing and let the price of corn be bid upwards. Cicero, of course, declared that his responsibility to the community of starving people outweighed his need for pecuniary gain. However, on the other side of the drachma, Polybius, the Greek historian, attributed the following to the merchants of Carthage: "Nothing that results in profit is regarded as disgraceful." Or, as William H. Vanderbilt put it somewhat more recently (just a mere century ago): "The public be damned." Of course, the cynical Mr. Vanderbilt neither was, nor is, the Chairman of the Committee on Professional Responsibility of the Federal Communications Bar Association to whom such sentiments would be, no doubt, shocking. We commend the Committee's attention to the matter at hand.

presumption that Chase had, in fact, been privy to such data. In addition, Chase has given no indication whatever that he had fully disclosed the conflict to NTI, and then obtained that former client's informed consent to Chase's representation of Liberty, as DR 5-105(C) would patently require. Previously, in a proceeding in which we permitted Chase to remain as counsel despite the probable need for Mr. Chase to testify as a witness, we "underscore[d] that the primary responsibility for avoiding conflict reposes with counsel, and *we expect counsel to withdraw forthwith if even a hint of actual conflict with its client ensues.*" *Miller Broadcasting, Inc., supra,* 98 FCC 2d at 729 (emphasis added).[8] Here, we have found a "somewhat" more pronounced indication of a conflict than a "hint": We have an on-the-record, publicly-proclaimed admission by counsel. Therefore, the ABA's Code of Professional Responsibility (DR 4-101(B), DR 5-105, Canon 9), and related case precedent (*Gov't of India* v. *Cook Industries, supra,* and *Silver Chrysler Plymouth, Inc.* v. *Chrysler Mot. Corp., supra*) strongly support the ALJ's ruling disqualifying Chase. Thus, we affirm and adopt the ALJ's sound, erudite discussion of these ethical principles and the case law set forth in his *Order* (at paras. 5-13). *See also* D.C. Bar Committee on Legal Ethics Opinions 27, 49, 131, 136 (legal ethics in various multiple representation situations).[9]

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[8] Even in the *Miller Broadcasting* proceeding, *supra,* some members of the bar were uneasy with respect to our failure to disqualify Chase absolutely. *See,* Arthur, *Attorney-Witness Allowed to Remain in FCC Proceeding,* Legal Times of Washington, September 10, 1984, at 1. However, "[l]egal ethics experts suggested that the Board's [*Miller*] decision was not unreasonable" in context. *Id.,* at 7. We reiterate herein that, once actual conflict occurs, counsel ought not hesitate to resolve it. We also note with concern the ALJ's reference to yet *another* proceeding over which he presides and in which Chase has apparently presented ethical problems similar to those present here. In his *Order* (at n. 10) the ALJ noted:

> This Administrative Law Judge has no recollection of previously being asked to disqualify a counsel for ethical reasons in the more than 10 years of service in that capacity. Yet, within the last month, the Presiding Judge, in two separate proceedings, has been asked to disqualify the same counsel for basically the same conflicts and problems noted in this Memorandum Opinion and Order. It would appear that counsel is either unable or unwilling to avoid ethical conflicts or, once recognized, to take appropriate and prompt action to resolve them.

[9] Moreover, we note with interest the D.C. Bar's efforts to revise and clarify the ethical obligations of attorneys and its issuance for public comment of Proposed Model Rules of Professional Conduct. In particular, proposed Rule 1.9 states:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests

13. In sum, we affirm the ALJ's action as plainly necessary to avert a miscarriage of justice which, unabated, might have irreparably tainted this entire hearing proceeding. Because Chase refused to remove the conflict voluntarily, the ALJ's obligation to conduct a fair and proper hearing (*cf. Independent Music Broadcasters, Inc.*, 68 FCC 2d 1412, 1417 (1978) (ALJ has overriding responsibility to develop untainted record)) left him no option but to assist Chase in avoiding the serious conflict herein presented.

14. ACCORDINGLY, IT IS ORDERED, That the Appeal filed June 4, 1986, by Liberty Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

ERIC T. ESBENSEN, *Member, Review Board*

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of the former client unless the former client consents after consultation.

D.C. Bar Report, Oct. Nov. 1985, Vol. 14, No. 2, at 11. Since, as discussed *supra*, there is no record indication of any "consultation" by Chase with his former client (NTI) — let alone of any informed "consent" — Chase's disqualification would clearly be mandated under the proposed rule.

Suburban Area

> Applications for a Class C FM Station, in contiguous communities which are part of the same urbanized area and have mutual interests and similar characteristics, which propose to serve the same areas are entitled to equal consideration under Section 307(b) of the Act.
> —*Hispanic Owners, Inc.*
> BC Docket No. 82-570

FCC 86-316

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
HISPANIC OWNERS, INC. Albuquerque, New Mexico	BC DOCKET NO. 82-570 File No. BPH-810423AD
PROFESSIONAL COMMUNICATIONS, INC. Albuquerque, New Mexico	BC DOCKET NO. 82-572 File No. BPH-810819AO
LORETTA ROSE SALAZAR Albuquerque, New Mexico	BC DOCKET NO. 82-573 File No. BPH-810819AW
SPANISH RADIO, INC. Albuquerque, New Mexico	BC DOCKET NO. 82-577 File No. BPH-810819BW
RIO RANCHO BROADCASTING, INC. Rio Rancho, New Mexico	BC DOCKET NO. 82-579 File No. BPH-810819BZ
Construction Permit for New FM Station	

ORDER

Adopted: July 7, 1986; Released: July 14, 1986

BY THE COMMISSION: COMMISSIONER DENNIS NOT PARTICIPATING.

1. This proceeding involves mutually exclusive applications for a new FM station in the Albuquerque, New Mexico, urbanized area. In a Decision, 99 FCC 2d 1180, released January 7, 1985, the Review Board granted the application of Loretta Rose Salazar. Now before the Commission are Applications for Review, filed February 6, 1985, by Hispanic Owners, Inc., Professional Communications, Inc., Spanish Radio, Inc., and Rio Rancho Broadcasting, Inc.; a Motion for Leave to File Supplement and Supplement to Application for Review filed February 15, 1985, by Rio Rancho Broadcasting, Inc.; Oppositions filed February 28, 1985, by Rio Rancho Broadcasting, Inc., March 5, 1985, by Professional Communications, Inc., and Loretta Rose Salazar, and March 6, 1985, by Loretta Rose Salazar; and a Reply filed March 20, 1985, by Spanish Radio, Inc.

2. Although we fully agree with the result in this case, comment is required on the Review Board's application of the decision in *Huntington Broadcasting Co.*, 14 FCC 563 (1950), *affirmed*, 192 F. 2d 33 (D.C. Cir. 1951), to Rio Rancho Broadcasting, Inc.'s claim of a preference under Section 307(b) of the Communications Act.[1] In *Huntington*, the Commission concluded that an applicant proposing to serve Huntington Park, California, was not entitled to a Section 307(b) preference over applicants specifying Los Angeles, because all the applicants proposed service to the same areas and the specified communities were contiguous and had similar characteristics. 14 FCC at 583. Rio Rancho has a contiguous border with Albuquerque (Tr. 381), its schools are part of the Albuquerque school district (Tr. 383), and while 30% of Rio Rancho's work force is employed within its borders, the majority of the remainder are employed in Albuquerque. Albuquerque is the commercial center of the entire urbanized area including Rio Rancho (Tr. 386). Each of the applicants propose power and height which will cover Albuquerque, Rio

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[1] Section 307(b) of the Communications Act, as amended, 47 U.C.S. § 307(b), requires the Commission, "In considering applicants for licenses, and modifications and renewals thereof ... to provide a fair, efficient, and equitable distribution of radio service ... among the several States and communities."

Rancho, and the entire urbanized area. This record establishes that pursuant to *Huntington*, Rio Rancho is an integral part of Albuquerque for Section 307(b) purposes.

3. In *Suburban Community Policy*, 93 FCC 2d 436 (1983), we held that the *Berwick*[2] and *Suburban Community*[3] policies had been utilized in an anti-competitive way against applicants for small communities and had made it difficult for those communities to obtain local radio service. We determined that the intentions of an applicant who specifies a small community would no longer be questioned. Our invocation of the *Huntington* doctrine is not inconsistent with our holding in *Suburban Community Policy*.[4] We are not questioning the intentions of the Rio Rancho applicant. Nor do we conclude that Rio Rancho is not a cognizable community with local needs and interests. We must recognize, however, that Albuquerque and Rio Rancho are part of the same urbanized area and are tied together by a mutuality of interests.[5] Under *Huntington* the Rio Rancho applicant and the Albuquerque applicants are given an *equal* chance to prevail. Because they have applied for a Class C station which can serve a wide area and because all the applicants will serve the Albuquerque urbanized area, the public interest is better served by selecting the best applicant on a comparative basis rather than by awarding a 307(b) preference.

4. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to File Supplement to Application for Review, filed February 15, 1985, by Rio Rancho Broadcasting, Inc., IS GRANTED and the Supplement IS ACCEPTED and the Reply filed March 20, 1985, by Spanish Radio, Inc. IS DISMISSED.[6]

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[2] *Berwick Broadcasting Corp.*, 12 FCC 2d 9 (Rev. Bd. 1968), *aff'd.* 20 FCC 2d 393 (1969).

[3] *1965 Policy Statement on Section 307(b)*, 2 FCC 2d 190 (1965).

[4] Relying in part on the Review Board's discussion in another proceeding, the Court of Appeals has concluded that the *Huntington* doctrine survived the Commission's 1983 action in *Suburban Community Policy. See Beaufort County Broadcasting* v. *F.C.C.*, ______ F. 2d ______, ______ (D.C. Cir. 1986). In a recent ruling, we specifically endorsed the analysis of both the Review Board and the Court of Appeals on this point. *See Debra D. Carrigan*, FCC 86—317 adopted July 7, 1986, at paras. 4—5.

[5] On the other hand, in those situations where the record establishes that the smaller community is not primarily a suburb of the nearby larger community, that the communities in question are not merely a part of a common urbanized area, and where the individual characteristics of each community are more significant than their similarities, a Section 307(b) choice will be made among the competing applicants. *See Beaufort County Broadcasting Company* v. *F.C.C., supra.*

[6] Under Section 1.115(f) of the Commission's Rules, reply pleadings may be filed only if requested by the Commission.

5. FURTHER, IT IS ORDERED, That the Applications for Review, filed February 6, 1985, by Hispanic Owners, Inc., Professional Communications, Inc., Spanish Radio, Inc., and Rio Rancho Broadcasting, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Program Origination

Upon a proper showing, waiver of Section 73.1130 of the Commission's Rules may be appropriate to permit a television licensee to exclude films and syndicated programs from the main studio program origination requirements.

—*Pappas Telecasting of Carolinas*

FCC 86-330

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of

Harry J. Pappas d/b/a PAPPAS TELECASTING OF THE CAROLINAS (WHNS(TV))	File No. BLCT-840319KE
For a License to Cover Construction of Major Changes in Facilities of UHF Television Station WHNS(TV), Asheville, North Carolina	

MEMORANDUM OPINION AND ORDER

Adopted: July 16, 1986; Released: July 28, 1986

BY THE COMMISSION: COMMISSIONER DENNIS NOT PARTICIPATING.

1. The Commission has under consideration an application for review filed pursuant to Section 1.115 of the Commission's Rules by Mark III Broadcasting Company, Incorporated (Mark III), licensee of station WAXA(TV), Anderson, South Carolina, and related pleadings. Mark III seeks review of the action of the Chief, Video Services Division, dismissing its petition to deny, and granting the above-captioned application of Pappas Telecasting of the Carolinas (Pappas) for a license to cover the construction of major changes in the facilities of WHNS(TV), Asheville, North Carolina.

2. In its petition to deny, Mark III alleged that WHNS(TV) does not maintain a main studio in Asheville, its city of license. It was reported that when a Mark III employee visited the site of WHNS(TV)'s proposed permanent main studio in Asheville, it was a vacant lot. It was therefore contended that the station's main studio is actually located at its auxiliary studio in Greenville, South Carolina, in violation of the Commission's Rules, and that Pappas has no intention of serving Asheville. Additionally, it was argued that Pappas' actions constitute an impermissible *de facto* reallocation of that frequency from Asheville to Greenville. Moreover, it was alleged that in the license application, Pappas misrepresented to the Commission that the WHNS(TV) main studio would be situated within Asheville thus raising a serious question as to whether Pappas possesses the requisite character qualifications to remain a Commission licensee. Moreover, Mark III asserted that the alleged misrepresentation of the main studio location eradicates the factual basis upon which the grant of the underlying construction permit authorizing service to Asheville was premised. Thus, Mark III urged the Commission to revoke the station's program test authority; rescind the grant of Pappas' construction permit; and designate the application for hearing on issues of misrepresentation and *de facto* reallocation.

3. By Memorandum Opinion and Order, the Chief, Video Services Division, acting pursuant to delegated authority, dismissed the Mark III petition to deny and granted the Pappas application. *Harry J. Pappas d/b/a Pappas Telecasting of the Carolinas*, Mimeo No. 4702 (released May 23, 1985). It was initially noted that, as a procedural matter recognized by Mark III, a petition to deny an application for a license to cover construction does not lie as a matter of law. 47 U.S.C. Sections 309(d)(2)(c) and 319(c). Nevertheless, in order to consider the allegations contained therein, the Mark III pleading was considered as an informal objection and denied on that basis. It was explained that there was no indication that construction of the WHNS(TV) technical facilities was not completed as authorized. Further, no merit was found to Mark III's unsupported and conclusory allegations that Pappas does not maintain a main studio in the Asheville city of license as required by Section 73.1125 of the Commission's Rules. It was stated that Mark III offered nothing to indicate that the WHNS(TV) studio in Asheville was anything other than its temporary main studio as represented in Pappas' application for an auxiliary broadcast studio-transmitter link microwave system from there to the

transmitter site. In fact, it was noted that on April 26, 1985, Pappas reported that construction of its permanent main studio in Asheville was complete and that, pursuant to Section 73.1125(b) of the Rules, it had relocated there. Additionally, no support was found for the assertion that the licensee's Greenville facility is functioning as the WHNS(TV) main studio, Mark III's derivative allegations of misrepresentation and *de facto* reallocation were found to be similarly without merit.

4. In its application for review, Mark III now states that the Mass Media Bureau was in error for not finding, on the basis of the statements submitted by the applicant, that Pappas failed to comply with Section 73.1130 of the Commission's Rules, which requires that a majority of a station's "non-network programs" originate from its main studio. It contends that because WHNS(TV) is not a network-affiliated station, all programming carried by the station falls within the ambit of Section 73.1130. Thus, Mark III argues that the Bureau avoided a determination as to compliance with the main studio rule by mistakenly accepting Pappas' statement that a majority of the station's "locally produced programs" originated from the then temporary main studio in Asheville. Further, Mark III asserts that the Bureau's failure to find that an issue exists as to whether Pappas made misrepresentations in filings with the Commission is contrary to the evidence in the record.

5. On January 17, 1986, Mark III filed a supplement to its application for review, alleging that new evidence demonstrates that WHNS(TV) originates no programming from its Asheville studio in violation of Section 73.1130 of the Rules and thus indicates a deliberate misrepresentation of those facts to the Commission. Mark III notes that in a related proceeding involving an application for transfer of control of WGCG-TV, Greenwood, South Carolina, to Pappas and to be operated as a satellite of WHNS(TV), it has learned that at least 99 percent of the Asheville station's programming (*i.e.*, movies and syndicated programs) originates from the Greenville, South Carolina, auxiliary studio. Mark III believes that, at most, one percent of the WHNS(TV) programming originates out of the Asheville studio in contravention of Commission rules requiring a majority of programming to originate from the city of license. It states that WHNS(TV) produces a one-half hour public affairs program each week in its Asheville studio, but that the broadcast of that program does not originate from there as the necessary equipment

does not exist.[1] Therefore, because that program, although taped in Asheville, originates for broadcast in Greenville, Mark III insists that Pappas is in clear violation of Section 73.1130 and that statements to the contrary constitute willful misrepresentation.

6. In its opposition to the application for review, Pappas supports the Bureau's May 23, 1985, action dismissing Mark III's petition to deny. Moreover, it rejects Mark III's allegation that WHNS(TV) is not in compliance with Section 73.1130 of the Rules as unsupported and contrary to the facts. In that regard, Pappas initially notes that as an independent, non-network-affiliated station, WHNS(TV) does not have any "network" programs. Further, it states that the station's programming can be grouped into two general categories: locally produced non-entertainment and informational programming, and general entertainment programming consisting primarily of feature films and syndicated programs. Of those programs that fall into the former category, Pappas states that the vast majority are originated in Asheville either at the station's main studio or from remote points within the city. WHNS(TV)'s general entertainment programming is broadcast from the auxiliary studio at the station's transmitter in Greenville. It argues that Mark III's interpretation of Section 73.1130 in the context of the entirety of WHNS(TV)'s programming schedule is inaccurate, unreasonable and would, in effect, create an unfair distinction between the main studio program origination obligations of network affiliated stations and independent stations.[2] Notwithstanding the foregoing, Pappas notes that Mark III's original petition was directed to the state of affairs

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[1] In support, Mark III has proffered the affidavit of a student at the University of South Carolina at Spartanburg, retained by it to inspect the WHNS(TV) facility during December, 1985. He opines that on the basis of that inspection, the station does not have the necessary equipment to originate any programming from the Asheville studio and that WHNS(TV) could not transmit from there "if its life depended on it."

[2] To the extent that network-supplied entertainment programs and films are presented by network-affiliated stations, Pappas notes that such programs can originate from any point outside the stations' communities of license. Yet, it argues, Mark III's proffered interpretation of Section 73.1130 would require independent stations to originate the very same programs from within their communities of license. Pappas submits that such a position is not only illogical, but also fails to address the primary policies underlying a licensee's main studio obligations; that is, the presentation of programs of local public concern and interest as opposed to those designed simply to entertain. Accordingly, inasmuch as the vast majority of locally produced programs addressing matters of interest to the residents of Asheville originate from there, Pappas maintains that WHNS(TV) operates in substantial, if not literal, compliance with Section 73.1130.

that existed immediately after WHNS(TV) resumed broadcast operations from its then temporary main studio in Asheville. Pappas contends that during that time, as well as at present, WHNS(TV) has adequately fulfilled its main studio obligations and nothing raised by Mark III warrants a contrary conclusion. Thus, Pappas urges the Commission to find that Bureau's May 23, 1985, decision is correct and that WHNS(TV)'s present operation is in "substantial compliance" with Section 73.1130(a), such that a waiver of that rule's literal provision is not required. However, in the event that the Commission deems it necessary for it to request and obtain such a waiver to originate WHNS(TV)'s entertainment films and syndicated programs from the station's Greenville facility, Pappas requests that it be granted such a waiver.[3]

7. With regard to Mark III's proffered supplement to its application for review, Pappas asserts that the pleading is unauthorized and fails to demonstrate that the information submitted could not have been discovered and submitted in a timely fashion. In any event, it states that the affidavit of the student retained by Mark III to inspect the Asheville studio is both inaccurate and irrelevant. Moreover, it restates that the Asheville studio fully complies with Commission rules. With respect to the weekly public affairs program referred to by Mark III in its pleading, Pappas states the station's practice is to tape that program during the week for the convenience of its guests and then transport the tapes to the station's auxiliary studio in Greenville for broadcast during the program's regular Sunday time slot. In that regard, Pappas states that although the Asheville studio is equipped to transmit the previously taped program to the station's transmitter via a studio transmitter link, it would be "administratively inconvenient" to adopt such a procedure which, it contends, provides no particular public interest benefit to Asheville residents. Nevertheless, were the Commission to adopt Mark III's proffered interpretation of Section 73.1130, Pappas states that it will transmit its local programming via microwave from Asheville to its transmitter.

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[3] Pappas notes that similar waivers of Section 73.1130 are routinely granted to radio licensees to permit them to exclude recorded music programming (what it terms the aural entertainment equivalent of television's entertainment films and syndicated programs) from the requirement that more than 50 percent of such station's non-network programs originate from the main studio in the community of license or from remote points therein.

8. We have reviewed the May 23, 1985, action of the Mass Media Bureau and conclude that the matter was fairly considered and properly decided. Mark III's initial contentions concerning a possible violation of the Commission's main studio location rule (Section 73.1125) were unsupported and conclusory, as noted by the Bureau. Nor do we find that the Bureau erred in not considering, on the basis of the information then before it, that the Asheville facility did not qualify as a main studio under Section 73.1125 because of a possible violation of the station program origination requirements of Section 73.1130 of the Rules. In opposition to the Mark III pleading, Pappas submitted the affidavit of its Vice President for Corporate Planning and Development who averred, among other things, that the majority of the station's locally produced programming originated from the then temporary main studio in Asheville. Such an observation in the context of a temporary studio does not constitute a general relaxation of the main studio rule, which refers to "non-network" programs, not just those that are locally produced. In any event, Mark III had the opportunity to challenge that showing as to all "non-network" programming in a reply pleading, but chose not to do so. Thus, the Bureau correctly concluded that Pappas' showing as to compliance with Section 73.1125 of the Commission's Rules was unrebutted by the petitioner. Mark III's application for review fails to provide a basis to alter the Bureau's decision.

9. Mark III's application for review and its supplemental pleading[4] fail to provide a basis to alter the Bureau's decision regarding Pappas' compliance with the main studio location rule. However, before addressing the specifics of Mark III's derivative assertion based upon a contravention of Section 73.1130 of the Commission's Rules, a matter raised for the first time in the application for review,[5] we believe it will be helpful to clarify our position with respect to that rule.

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[4] Section 1.115(d) of the Commission's Rules requires applications for review and any supplements thereto to be filed within 30 days from the date of this public notice of the Bureau's action. While Mark III's supplemental pleading was filed well beyond that 30-day period, the pleading contains certain information relevant to our consideration of WHNS(TV)'s compliance with Section 73.1130, and we will, therefore, consider it.

[5] The application for review does not fully comport with Section 1.115(c) of the Commission's Rules. However, it raises important issues concerning our program origination requirements for WHNS(TV) and other independent television broadcast stations, which warrant Commission consideration at this time. See Section 0.283(b)(4) of the Commission's rules.

10. The Commission's policy that the public interest is served by a licensee maintaining its main studio in its city of license is one of the means by which we have implemented Section 307(b) of the Communications Act of 1934, as amended. That section requires us to provide a "fair, efficient and equitable distribution of radio service" among the nation's states and communities. In the past, several factors have been considered in determining a television licensee's compliance with the main studio location rule, including the number and function of employees at each studio and the facilities that each contains, *Nationwide Communications, Inc.*, 18 FCC 2d 171, 172 (1969). *See also Gulf Television Co.*, 20 FCC 734, 755 (1956). One of the prime factors, however, is the percentage of local programming originating from a station's main studio. In *Nationwide*, we stated a licensee will achieve compliance with program origination requirements if more than 50 percent of a station's programs, exclusive of network programs, originate from its main studio in the city of license and that roughly the same ratio would be acceptable as to the origination of locally produced programs. 18 FCC 2d at 173.

11. Although the 50 percent program origination requirement is merely one indication of whether a station serves the local needs and interests of its community, we have, on occasion, found that this goal is not always achieved by the rigid application of a fixed minimal percentage requirement without considering the general nature of the programming involved. In the case of radio licensees, we have found that so long as a studio is maintained in the community of license for the purpose of presenting local news, discussions of local public affairs, public service programs, local religious programs or similar types of programming of a local nature, it would be unrealistic and unreasonable to require that a majority of all the station's programs originate from such a studio, particularly when the majority of the station's programming consists of recorded music. *Arizona Communications Corporation*, 25 FCC 2d 837, 839-40 (1970), *recon. denied*, 27 FCC 2d 283 (1971). There, it was stated that the location from which recorded music programs originate is irrelevant to the public interest and will not affect the station's primary responsibility of service to its assigned community. Nevertheless, in such cases where this type of recorded generalized entertainment programming has been permitted to be excluded from the program origination calculation, the concern that a licensee maintain a *bona fide* presence in the community of license has not diminished. In *Arizona*, it was stated a licensee must maintain a studio

in the city of license which is not only convenient and accessible to residents of the community and those who actually participate in programs, but one which by the nature and, to a certain degree, the amount of programming originating therefrom tends to establish the station, in the eyes of the community, as one serving its particular needs and interests. Further, it was found necessary for the station's main studio to contain adequate and appropriate facilities for the presentation of all programs originating from there and that the program line utilized between that studio and the station's transmitter site meet the technical quality standards set forth in our rules.

12. The petitioner correctly observes that, with respect to television licensees, the Commission generally considers whether the majority of not only local, but also the total non-network programming presented originates from the claimed main studio. However, under certain circumstances, we have found that the exclusion of entertainment programming from that calculation may be appropriate. *See Ponce Television Corporation*, 17 FCC 2d 411 (1969).[6] Moreover, in *KTVE, Inc.*, 22 FCC 2d 477 (1970), we found the television licensee in compliance with the rule where approximately 53.1 percent of its "live local programs" originated from the station's main studio. With the underlying policies and goals of the main studio location and program origination rules in mind, we are unable to conclude that this licensee's practice of originating the broadcast of general entertainment programming, consisting primarily of films and syndicated programs from its auxiliary studio located outside the community of license in any material way detracts from its public interest responsibilities. In fact, for these purposes, we are unable to distinguish between the recorded music programs in the *Arizona* case and the general entertainment programming present here. Accordingly, we believe that upon a proper showing, waiver of the main studio program

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[6] The exclusion of entertainment programming in the *Ponce* case was tailored to the specific facts presented and was distinguished in the *Nationwide* case. Because there are no Spanish-language networks in Puerto Rico comparable to the English-language networks on the mainland, many Puerto Rican television stations produce their own entertainment programming. In *Ponce*, the licensee was seeking to program independently, rather than rely on rebroadcasts of entertainment programming from Station WKAQ-TV, San Juan. Given the technical personnel and the Spanish-language entertainment industry in San Juan, the licensee could not have easily reached its goal of becoming an independently programmed station if it were required to originate entertainment programs in Ponce. Since we believed that the licensee's goal would serve the public interest, we concluded that the exclusion of entertainment programming would be appropriate.

origination rule may be appropriate in accordance with the principles enunciated in the *Arizona* case.

13. With the above discussion in mind, we note that, to the extent that WHNS(TV) does present locally produced programming, more than 50 percent is originated from its main studio in Asheville or from other remote points in that city. We are not persuaded by Mark III that Pappas' practice of taping its weekly public affairs program in Asheville and transporting the tapes to its auxiliary studio in Greenville for origination to its transmitter on the day of broadcast requires a contrary conclusion. In *Central California Communications Corporation*, 47 FCC 2d 1001, (1974), we stated that a licensee must be capable of programming its transmitter from its designated main studio. We expect Pappas to maintain such a capability on an ongoing basis. From the materials before us, however, we are unable to conclude that Pappas' preferred method of transporting its taped local programming via ground transport, as opposed to microwave transmission for which it is authorized and capable, inherently or adversely impacts its public interest responsibilities to Asheville residents.[7] Therefore, to the extent that Pappas seeks a waiver of Section 73.1130 of the Rules to permit it to originate its films and syndicated programs from its auxiliary studio in Greenville, we believe that good cause exists for permitting Pappas to exclude that programming from the program origination computation. In the absence of an *Arizona*-type waiver for television licensees, a literal interpretation of Section 73.1130 would require independent stations to originate the very same programs from within their communities of license.[8] We believe that such a position is not only unreasonable, but also fails to address the primary policies underlying a licensee's main studio obligations; that is, the presentation of programs of local public concern and interest. In

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[7] Moreover, we are not persuaded that a different conclusion is warranted on the basis of the personal opinion of the university student retained by Mark III to inspect Pappas' Asheville facility who believes that "WHNS could not transmit from the present Asheville office if its life depended on it." On the basis of the materials submitted, we conclude, for purposes of this discussion, that the licensee is aware of, and complies with, its responsibility to maintain a visible, accessible and fully equipped and staffed facility in Asheville sufficient to meet its service obligations there. *See e.g., WHYY, Inc.*, 93 FCC 2d 1086, 1105 (1983) and *Educational Broadcasting Corporation*, 70 FCC 2d 2204, 2240-41 (1979).

[8] On June 11, 1986, the Arizona Justice Committee filed a petition for rulemaking seeking modification of Sections 73.1125 and 73.1130. Our action of today, based on those rules as they now exist, is taken without prejudice to whatever reexamination of those rules and policies may later be deemed appropriate as a result of that petition.

all other respects, we expect that the licensee meet the main studio obligations discussed above.

14. Finally, as to the allegation that Pappas has willfully misrepresented its compliance with Section 73.1130, we find no substantial and material question exists requiring further inquiry. Misrepresentation connotes a false statement of an objective fact intentionally made to deceive. While it is true that the licensee was not in literal compliance with Section 73.1130, there is nothing to indicate that it made false statements regarding its operation from its permanent main studio when construction there was complete or that its misplaced interpretation of that rule rises to the level of misrepresentation. The petitioner's allegations fall short of a *prima facie* showing of a substantial question of deception. *See Brownfield Broadcasting Corp.*, 93 FCC 2d 1197, 1202 (Rev. Bd. 1983). However, with respect to Pappas' operation of WHNS(TV), prior to our approval of its request for waiver of Section 73.1130, we will refer the matter to the Enforcement Division of the Mass Media Bureau to examine the record in this proceeding to determine whether further action is appropriate.

15. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules, the Mass Media Bureau's May 23, 1985, decision granting the application for a license to cover construction of major changes in the facilities of WHNS(TV), Asheville, North Carolina, IS AFFIRMED, and the application for review filed by Mark III Broadcasting Company, Incorporated IS DENIED. Moreover, Pappas' request for waiver of Section 73.1130 of the Commission's Rules IS GRANTED subject to the following conditions:

a. The majority of the licensee's programs, exclusive of films and syndicated programs, shall originate at the authorized Asheville, North Carolina, studio. The remainder of the licensee's programming may originate at the licensee's auxiliary studio in Greenville, South Carolina. The provisions of Section 73.1130(a) of the Commission's Rules are waived to permit operation in this manner.

b. The station must provide program transmission capability from its main studio to the transmitter which would permit live programming at any time the station is on the air.

c. The licensee, as specified in its request, shall provide a meaningful and significant presence in its community of license with respect to specific staffing and minimum number of broadcasting hours at the main studio.

16. Copies of this Memorandum Opinion and Order shall be sent Certified Mail — Return Receipt Requested to the parties to this proceeding by the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Comparative Criteria
Multipoint Distribution Service

Where the record was not sufficient for an objective judgment that either applicant is preferable to the other under the pertinent comparative factors, the Commission ordered a tie-breaker lottery pursuant to 47 U.S.C. 154(j) and 47 C.F.R. 1.824(a).

—*RRAD, Inc*,
CC Docket No. 84-1272

FCC 86-313

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
RRAD, INC.	CC Docket No. 84-1272 File No. 11022-CM-P-80
and	
MICROBAND CORPORATION OF AMERICA	CC Docket No. 84-1273 File No. 50048-CM-P-81
For Construction Permits in the Multipoint Distribution Service for a New Station at Joliet, Illinois	

DECISION

Adopted: July 7, 1986; Released: July 15, 1986

BY THE COMMISSION: COMMISSIONER DENNIS NOT PARTICIPATING.

1. This proceeding involves the mutually exclusive applications of RRAD, Inc. (RRAD) and Microband Corporation of America

(Microband) for authority to construct a new station in the Multipoint Distribution Service (MDS) to serve Joliet, Illinois, on Channel 1. By *Memorandum Opinion and Order* issued by the Chief, Domestic Facilities Division, Common Carrier Bureau, 50 Fed. Reg. 2617 (Jan. 17, 1985) (*Designation Order*), both applicants were found to be legally, technically, financially and otherwise qualified to provide the proposed service, and the applications were designated for hearing to determine on a comparative basis which should be granted.[1] The Presiding Administrative Law Judge (ALJ) released an *Initial Decision (I.D.)* on October 31, 1985, in which he concluded from the very minimal showings made by the applicants that "the parties are in a dead heat."[2] He certified the proceeding to the Commission for consideration pursuant to *Lottery Selection Among Applicants*, 57 RR 2d 427, 430-431 (1984).[3] Exceptions were filed by Microband. Replies to exceptions were filed by the Chief, Common Carrier Bureau (Bureau) and by RRAD.[4]

2. Microband takes exception to the result in the *I.D.* on both procedural and substantive grounds. It contends that its evidence should have been accepted and the record closed at an early point in the proceeding when RRAD was not prepared with its case, and it argues that the evidence later developed on the record shows it to be the superior applicant. In either case, Microband argues, it should have been awarded the construction permit. The Bureau and RRAD disagree with Microband on both points and support the ALJ's recommendation that a tie breaker lottery be used to select a permittee in this case.

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[1] The mutually exclusive application of Wilco Vision was also designated for this hearing in CC Docket 84-1271. It was dismissed with prejudice during the hearing pursuant to the motion of one of the parties. Tr. 50.

[2] *RRAD, Inc.*, FCC 85-D69 (ALJ), released October 31, 1985), slip op. at 5, para. 16.

[3] The Commission stated its intention to select among applicants on a random basis when, after a full evidentiary hearing and preparation of an initial decision pursuant to the Administrative Procedure Act, 5 USC § 557, two or more applicants are found to be tied. In such cases, exceptions are to be filed directly with the Commission pursuant to Sections 1.276 and 1.277 of the Commission's Rules. 57 RR 2d at 431, n.6.

[4] Reciting problems with service of Microband's Exceptions, the Chief, Common Carrier Bureau, and RRAD both filed requests for acceptance of late-filed pleadings. Because the Exceptions were mailed to an incorrect street address for the Bureau and an incorrect zip code for RRAD, resulting in service delays, both requests will be granted. The Bureau's and RRAD's replies will be accepted.

3. The Commission has reviewed the *I.D.* in light of the exceptions filed by Microband and our own examination of the record. The ALJ's findings of fact and conclusion are adopted, except as modified in this *Decision.* In particular, from the record evidence before us, we find that there are no differences of decisional significance between the applicants upon which we can rationally and fairly base a selection. Thus, we conclude that the ultimate choice between the applicants should be made by a tie-breaker lottery.

4. In taking exception to the *I.D.*, Microband first argues that the ALJ erred in following a course that ensured this comparative consideration of the competing applicants. Microband contends that the ALJ should have proceeded with the hearing on the originally scheduled hearing date by accepting Microband's exhibits and closing the record, although RRAD was not ready to proceed on that date. Microband points to RRAD's repeated failure throughout this proceeding to meet procedural dates specified by the ALJ and, in particular, to RRAD's failure to exchange exhibits on time or serve notice of its intent to cross examine Microband witnesses, as well as to its failure to be prepared for the hearing. See Tr. 24, 25.

5. On May 6, 1985, the hearing date in question, RRAD appeared through Mr. Roland Duncan, its principal, who expressed confusion about the status of settlement negotiations with Microband. He advised the ALJ he was waiting to hear back from Microband before proceeding because he believed Microband had made a commitment to seek settlement during a prehearing conference he had been unable to attend. Tr. 23–24.5. Observing that no party seemed prepared with witnesses, the ALJ expressed concern about proceeding under the circumstances. Microband, which had exchanged exhibits on the specified date, tendered affidavits to support its exhibits, but the ALJ chose not to accept them since no witnesses were available for cross examination. Although counsel for Microband argued that witnesses weren't required unless requested by another party, Tr. 26, 28–29, 38, the ALJ adjourned the session so that the question of settlement negotiations could be resolved. Tr. 37, 38. In light of the ALJ's ruling on its tendered exhibits, Microband stated through counsel that it had no objection to postponing the hearing "to eliminate any type of confusion and to give everyone a full opportunity to participate." Tr. 34. Microband further stated it had not and was not then making a motion to dismiss. Tr. 34–35.

6. Microband now argues that the ALJ's refusal to accept its exhibits on May 6th was error as a matter of law. It concludes that, if the exhibits had been accepted, the ALJ then should have closed the record on May 6th and granted Microband's application or, in the alternative, should have dismissed RRAD's application and granted Microband's.

7. The fundamental flaw in Microband's argument is apparent on its face because, even if the ALJ had accepted Microband's exhibits on May 6th rather than on a later date, the ALJ would not have been compelled to bring the case to a close at that time. Microband had no right to a favorable disposition of its application on that date. Thus, while the ALJ did not follow the common practice of requiring a sponsoring witness rather than an affidavit only when another party has requested the witness for cross-examination, Microband has not been harmed in any legally cognizable way by that ruling. Microband was able to enter its exhibits into evidence at a later date, and these exhibits were considered by the ALJ in his decision on the merits, so Microband's right to be heard on the merits was not affected by the ALJ's May 6th ruling.

8. Microband also was not unfairly prejudiced because the ALJ did not act unilaterally to dismiss RRAD's application on May 6th. Just as no applicant has a vested interest in the disqualification of a competing applicant, *Azalea Corp.*, 31 FCC 2d 561, 563 (1971), no applicant has a vested interest in a competing applicant's dismissal. Indeed, in light of the affirmative statement by Microband's counsel that Microband was not then seeking RRAD's dismissal, a statement that can reasonably be construed as acquiescence in RRAD's continued participation in the proceeding, Microband's argument now that the ALJ should have dismissed RRAD's application is disingenuous. More important, however, nothing in the record compels us to conclude that the ALJ's decision to permit RRAD's continued participation was arbitrary, capricious, or an abuse of his discretion in this case. Both the Administrative Procedure Act, 5 U.S.C. § 556(c), and the Commission's Rules, 47 C.F.R. § 1.243 (1985), clearly delegate control over the conduct of the proceeding and the receipt of evidence to the presiding ALJ. Here, where RRAD clearly stated its intent to proceed and noted its confusion about the status of settlement negotiations preceding the May 6th hearing date, we cannot say the ALJ erred in postponing the hearing session, even if his decision was due in part to his assumption that Microband, like RRAD, was unprepared to proceed. While, arguably, the ALJ

could have dismissed RRAD's application as he had warned RRAD he might,[5] his decision to allow the parties time to pursue a settlement before taking evidence was not an unreasonable exercise of his discretion requiring our interference. *See Progress Broadcasting Corp.*, 3 RR 2d 542, 544 (Rev. Bd. 1964). Microband ultimately had a full and fair hearing and its argument that the same opportunity should not have been afforded to RRAD does not demonstrate reversible error. Its exception to the ALJ's ruling is denied.

9. Microband next takes exception to the ALJ's conclusion that there are no significant differences between the applicants. It points to its three brief exhibits and the testimony of its single witness as support for its argument that its application must be preferred over what it characterizes as the less than firm proposal of RRAD. However, like its previous argument about the significance of an evidentiary ruling, its assertion of its demonstrated comparative superiority is overstated, and its exception is denied.

10. The framework for reviewing this exception was set forth in the *Designation Order*. There, relying on the Commission's direction in *Frank K. Spain*, 77 FCC 2d 20 (1980), the Common Carrier Bureau specified that the comparative consideration should be based on the following factors:

> (a) The relative merits of each proposal with respect to efficient frequency use, particularly with regard to compatibility with co-channel use in nearby cities and adjacent channel use in the same city;
>
> (b) The anticipated quality and reliability of the service proposed, including installation and maintenance programs; and
>
> (c) The comparative cost of each proposal considered in context with the benefits of efficient spectrum utilization and the quality and reliability of service as set forth in issues (a) and (b).

For a discussion of these factors, the parties were referred to *Frank K. Spain* by note 1 to the *Designation Order*.

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[5] The cases cited by Microband support the principle that the ALJ has broad discretion to control the conduct of the proceeding before him. Although they all involve affirmance of a presiding officer's decision to dismiss applications, each is distinguishable from the instant proceeding. *Broadcast Data Corp.*, 97 FCC 2d 650 (Rev. Bd. 1984) (dismissed applicant had announced it would not submit a comparative case); *Mad River Broadcasting Co.*, 97 FCC 2d 679 (Rev. Bd. 1984) (dismissed applicant offered no reasonable explanation for noncompliance). *Lebanon Valley Radio, et al.*, 11 FCC 2d 31 (Rev. Bd. 1967) (dismissed applicant failed to make timely showing on qualifying issue); *Reliable Broadcasting Co.* 25 RR 93 (Rev. Bd. 1963) (dismissed applicant did not have substantial excuse for failing to meet procedural dates).

11. To evaluate the two applicants pursuant to these factors, the Commission needs evidence that is reliable, probative and relevant.[6] The burden of introducing such evidence and of proving comparative superiority is on each of the applicants[7] and cannot be discharged by hearsay or self-serving conclusory statements. The difficulty in this case is that neither Microband nor RRAD has met its burdens. The applicants were found to be qualified when designated for comparative consideration, and they remain qualified.[8] However, neither has taken seriously the comparative factors set forth in the *Designation Order* or the discussion of the expected showing for these factors set forth in *Frank K. Spain.*

12. Microband responded to factor (a), which deals with efficient frequency use, particularly with respect to co-channel and adjacent channel use, by submitting an exhibit reflecting its plans to change its transmitter from that proposed in its application. Microband Ex. A.[9] This exhibit gives only the barest information about the rest of Microband's technical proposal, and it recites Microband's intent to design its system "so as not to preclude the possibility of MDS station [sic] in other communities." It also includes the statement that Microband's proposed facility will provide a new service to Joliet without having an impact on the service areas of existing MDS stations, but the basis for this conclusion has to be found in the interference studies Microband submitted with its application in 1980.[10] While the information from Microband's Exhibit A and its application shows that Microband's proposal "will provide minimally acceptable efficient frequency use with regard to adjacent and co-channel operations,"[11] it does not include any analysis as to how Microband's proposal will be comparatively more effective than RRAD's "in providing adequate service to the public consistent with efficient use of the radio spectrum and cost compatibility."[12] In other

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[6] *See* Attorney General's Manual on the Administrative Procedure Act, page 76 (1947).

[7] Communications Act of 1934, as amended, 47 U.S.C. § 309(e); 47 CFR § 1.254 (1985).

[8] No issue has been raised about the basic qualifications of either applicant.

[9] During the hearing, Bureau counsel noted this change can be made without amending the application. Tr.71.

[10] We take official notice of this application.

[11] *Frank K. Spain*, 77 FCC 2d at 27.

[12] *Frank K. Spain*, 77 FCC 2d at 24. In *Spain* the Commission stated that receiver and down converter characteristics could also be relevant to evaluating an applicant's proposal under this factor. However, because the particular systems to be used will depend on future customers' requirements, Microband did not submit information on receivers or down converters about which it

words, Microband has repeated the conclusion drawn from its application that it has met the Commission's filing requirements with respect to an analysis of interference to and from other MDS stations,[13] but it has not elaborated on its use of the spectrum in any way that is enlightening for comparative purposes. Thus, we find that Microband has not made a responsive showing under this factor and, therefore, is not entitled to any comparative credit for efficient frequency use.

13. With respect to factor (b), the anticipated quality and reliability of the proposed service, Microband's showing is no more helpful for comparative purposes than its showing about efficient spectrum use. Microband has submitted only conclusory statements of its intent to use "qualified" entities for installing and maintaining the proposed facility. Microband Ex. B. By "qualified" it means only that "these people have to be qualified under the FCC rules, and hold a Second [Class] FCC license." Tr. 58. Microband plans to hire a local firm for maintenance, but at the time of the hearing it had not identified potential contractors,[14] so the specific arrangements or qualifications of the firm cannot be evaluated.

14. During the hearing Microband sought to establish the reliability of its proposed Joliet system by referring to its New York City system using the same model of transmitter Microband now proposes for Joliet. Tr. 63–64. However, in light of Microband's argument to the ALJ that maintenance rather than identity of equipment is the important consideration (Tr. 62–63) and in light of testimony suggesting that special attention might be given to the New York City system because Microband has "a very good customer in New York" and that system is monitored "practically 24 hours a day round the clock," Tr. 64, we do not find this limited testimony about "negligible" down time in New York to be relevant or probative with respect to the instant proposal.

15. Microband also attempts to show enhancements to its service reliability by asserting that its headquarters corporate engineering staff will be "on-call" twenty-four hours a day for

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could only speculate. Exceptions of Microband Corporation, page 8, note 5 (filed December 2, 1985).

[13] *See* 47 C.F.R. § 21.902 (1980).

[14] While Microband identified the Chicago firm it uses for maintaining its Chicago MDS station, this is irrelevant to Microband's comparative qualifications here since Microband has not decided whether to hire the same firm for Joliet, Tr. 59, 69, 81, and there is no evidence that Microband has even discussed with it the firm's possible availability to maintain a station in Joliet.

consulting about problems arising "throughout the country" and that the company has a centralized stock of spare parts available for immediate shipment. Microband Ex. B. But, it offers no elaboration at all on these two points. The Commission has no basis on the record for evaluating the nature of these asserted enhancements or how they will affect service quality and reliability in Joliet, and we cannot make assumptions about these enhancements outside of the record. *Miner v. FCC*, 663 F 2d. 152 (D.C. Cir. 1980). Equally important, Microband has not offered evidence about the costs of the corporate engineering staff or the spare parts to the proposed Joliet facility. Tr. 64-65. Without this information, we cannot weigh costs against proposed benefits as required by *Frank K. Spain, supra*, 77 FCC 2d at 26. Thus, nothing in this record supports Microband's contention that it is entitled to any comparative credit under this factor.

16. For factor (c), the comparative costs of the proposals, Microband admits that it did not submit information about its anticipated costs.[15] In spite of this, Microband argues it has cost advantages because of its marketplace position as the largest carrier in the MDS industry. Microband Ex. C. This assertion, however, is totally unsupported by any record evidence and cannot substitute for the information about reasonable cost estimates sought under the cost factor.[16]

17. In addition to alleging its own comparative superiority, Microband challenges the adequacy of RRAD's showings under the comparative factors. We agree with Microband and find that RRAD is not entitled to comparative credit, either. With respect to efficient use of the frequency, RRAD, like Microband, simply repeats the conclusion drawn from the interference study in its application about its site being selected to minimize interference from other MDS stations.[17] RRAD has not offered any analysis about how its use of the spectrum will be comparatively more effective than Microband's use. Like Microband, RRAD is not

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[15] Microband asked the ALJ to take official notice of a tariff on file. However, even if Microband had provided this tariff in an exhibit which the ALJ had said he would allow, Tr. 65, this information would not have been responsive to the cost information sought. In *Frank K. Spain*, the Commission specifically eliminated tariff rates as a measure. 77 FCC 2d at 26-27.

[16] *Frank K. Spain* 77 FCC at 26-27, n. 8, provides guidance for developing a total annual cost figure for comparative purposes.

[17] Microband makes a point of RRAD's failure to complete the showing by stating that its proposed facility will not cause interference to other MDS stations. This showing was made with RRAD's application in establishing its basic qualifications, which are not in issue, and it need not be repeated in the comparative phase of the proceeding.

entitled to any comparative credit under this factor.

18. RRAD also is not entitled to credit for its showing under the service quality and reliability factor. It has provided a bare outline of its intentions, but it has not offered substantive information upon which a comparative evaluation can be made. RRAD plans to rely on the consulting and installation of "turnkey" services of a particular equipment manufacturer that has installed other MDS facilities. Although it does not have a contract with this company for the expected equipment purchase or installation service, it has discussed its needs with the manufacturer's representative. Tr. 88–89, 93. RRAD plans to have maintenance provided locally by personnel trained by the turnkey service provider and it expects to have troubleshooting assistance available from the turnkey service provider, RRAD, Ex. D., but it offers no further relevant information about its maintenance plans. It does not allege any particular enhancements to its proposal for comparative purposes.

19. RRAD did submit cost information in the form of a product and price list from EMCEE Broadcast Products (RRAD Ex. B.) and a transmittal letter for the list (RRAD Ex. C.). However, these exhibits are entitled to no weight for comparative cost analysis purposes because the listed prices are no longer available and there might be "minimal" changes in EMCEE's proposal (Tr. 92). Microband argues in its Exceptions that these exhibits provide a basis for assessing a comparative demerit against RRAD. It reasons that RRAD's proposal is cost and operationally inefficient because the amplifier shown in the list can operate at 100 watts while, consistent with Commission rules, RRAD actually proposes only 10 watts of output power. However, Microband has shown no basis for this conclusion other than its apparent but unsupported assumption that equipment capable of operating at 100 watts but actually operated at 10 watts is inherently more costly than equipment designed to operate at 10 watts. Nothing in the record suggests the equipment cannot operate as RRAD has proposed, and nothing in the record suggests that this equipment is needlessly expensive. While RRAD is not entitled to any credit under the comparative cost factor, no demerit is warranted.

20. Microband concludes by arguing it must be preferred because RRAD does not have a firm proposal for a site or for equipment that can be compared with Microband's. In its application, RRAD specified the tower of FM broadcast station WCCQ, the same site selected by Microband when it later filed its

application. RRAD verified the availability of this site before the hearing, as did Microband, Tr. 71, and was advised orally that the site would be available to whichever applicant would be awarded the permit in this proceeding.[18] Tr. 99, 101. No question has been raised undermining the validity of this assurance.[19] During cross-examination, however, RRAD's Duncan testified that the site he originally wanted has been filled with other users and is not available but that other sites including the one proposed in his application are available.[20] Tr. 99–100. He said he would use whichever site is available when he is awarded a permit. Tr. 99–101. This testimony, Microband submits, shows RRAD's proposal is not firm. We do not agree. Duncan affirmatively testified he is proposing the WCCQ site. Tr. 101. We read his remark about using whichever site is available when the proceeding is terminated as an expression of his concern that, with the passage of additional time, the tower might be filled with other users, and, thus, become unavailable to him. Tr. 101.[21] Neither this concern which he has assuaged by investigating the possibility of alternatives nor his concern about being unable to enter into a firm committment before having a construction permit undermines the site proposal in RRAD's application.[22] He has established reasonable assurance that his proposed site is available and he has gone farther by identifying other possible sites in the event his proposed site becomes unavailable. While Duncan's testimony was less artful than it might have been if he were more experienced in Commission proceedings or had the assistance of counsel, his confusion during the hearing and his precautions against unforeseen circumstances do not warrant any adverse finding.

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[18] The site was sold during the pendency of the applications in this proceeding. The availability was verified by a representative of the new owner. Tr. 71, 100.

[19] *See generally East Side Broadcasting Co.*, 1 RR 2d 763, 765 (Rev. Bd. 1963) (an uncontradicted oral promise is sufficient).

[20] Duncan testified as to his difficulty in recalling events surrounding his original site preference. Tr. 99. The application had been filed five years before the hearing.

[21] The possibility that a transmitter or receiver site may be lost before action on an application is acknowledged in the Commission's Rules. See 47 C.F.R. § 21.31(e)(6)(i).

[22] *See generally Suburban Broadcasting Co., Inc.*, 19 RR 956a, 959 (1960). There a site issue was refused although the manager of the proposed site conditioned execution of a lease on the availability of the site when a CP would be issued. The Commission said, "[We] do not require an applicant to enter into a final binding arrangement in order to establish that a site is available to him."

21. Microband's attack on the certainty of RRAD's equipment proposal is based on Duncan's testimony about updating his proposal with EMCEE's assistance if awarded the permit. In particular, there is a more current transmitter model. Tr. 92. The technical proposal in the application is complete, however, and nothing in the record suggests that the contemplated updating will affect any of its key characteristics, such as emission, output power, or coverage area. Rather, such changes seem comparable to the minor changes Microband has made in its equipment selection. Microband Ex. A. RRAD has not been given any comparative credit for the specifics of its equipment proposal, and Microband has not sought such a credit for the specifics of its own equipment proposal. Microband's asserted entitlement to a preference is based only on the fact of having revised its choice before the hearing. Under these circumstances, we do not believe any preference for Microband or any demerit for RRAD is warranted because RRAD may later make changes in its equipment selection that are comparable to changes already announced by Microband.[23]

CONCLUSION

22. When these applications were designated for hearing, both applicants were found to be qualified. The issue was simply which of the two should be preferred. Both applicants were heard by the ALJ and each was permitted to introduce all the evidence it tendered on the comparative issue. In spite of this opportunity, the record is not sufficient for an objective judgment that one is preferable to the other under the factors enumerated in the *Designation Order*. From the little information provided about their proposals, the applicants appear comparable. No differences of decisional significance can be found in the record. Both applicants plan to operate at the same power from the same site. They plan to use qualified, experienced installers. They have proposed different transmitting equipment, but this equipment can be changed at any time without prior Commission approval, and Microband has argued that maintenance rather than transmitter model is far more critical for reliable station operation. With respect to maintenance, both proposals are comparable in their vagueness. Both plan to use local service, but neither has

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[23] We note that RRAD is not required to have a binding agreement for purchasing specific equipment at a fixed price in order to be qualified for a permit. Reasonable certainty of implementing its equipment purchasing plans is sufficient.

made any determinations about available personnel. The applicants use almost the same descriptions of the characteristics that will guide their maintenance service selections: Microband's will be "qualified" (Microband Ex. B); RRAD's will be trained personnel working for a company "qualified to perform communication servicing" (RRAD Ex. D), but any differences in these articulated criteria are in the eye of the beholder rather than the record. Neither applicant has offered actual, current cost data, just hypothesis as to whether a large corporation or a small local concern may have cost advantages. Although Microband asserts its superiority because of its corporate engineering staff and central supply of spare parts, there is no record showing the costs and benefits of these to its Joliet proposal. In short, neither applicant was inclined to proceed with the introduction of relevant, probative evidence or to persuade the Commission that its proposal would better serve the public interest.[24] Yet, each applicant bore the burden of convincing the Commission on this issue.[25]

23. If faced with a record like this on a qualifying issue, we would simply deny the applications for their proponents' failure to sustain their burdens.[26] Here, however, where both applicants have already been found qualified and either could be granted under Section 309(c) of the Communications Act, 47 U.S.C. § 309(c), if they were not mutually exclusive, we cannot simply deny them for failing to meet their burdens on the comparative issue. Nor can we contrive a distinction between them by accepting self-serving conclusory statements as sufficient evidence from one applicant while criticizing the other for offering nothing probative. Our dilemma, then, is how to choose between them in a way that is not impermissibly arbitrary and capricious.[27]

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[24] Ultimate conclusions are for the Commission's determination, and it is the applicant's burden to supply the Commission with a sufficiency of facts upon which such a conclusion may be based. *Radio Specialists Company*, 33 FCC 812, 24 R.R. 687 (1962), *quoted in Whitney Telephone Answering Service*, 1 FCC 2d 1346, 1347 (Rev. Bd. 1965).

[25] *See Chicagoland TV Co., et al.*, 11 FCC 2d 96, 105 (Rev. Bd. 1967).

[26] *See generally, Texan Broadcasting Co., Inc.*, 90 FCC 2d 787 (Rev. Bd. 1981); *KXYZ Television, Inc., et al.*, 8 FCC 2d 937 (Rev. Bd. 1967); *Verne M. Miller*, 3 FCC 2d 145 (Rev. Bd. 1966).

[27] Although remand to the ALJ for taking further evidence is an option, the applicants have not sought this and we do not think offering the applicants a second bite of the apple is appropriate here where they have had ample opportunity to present their cases. In the interest of administrative finality, this proceeding should be brought to an end. *See generally Baker Protective Services, Inc.*, 97 FCC 2d 570, 577 (Rev. Bd. 1984), where the Board notes that a litigant cannot wait to see how the case will be resolved before offering evidence.

24. In *Lottery Selection Among Applicants*, 57 RR 2d 427, 430-431 (1984), cited by the ALJ in his *I.D.*, we considered the possibility that we might be faced with "a legitimate 'tie' situation," and we reached two important conclusions. One is that

> such a situation would leave the Commission no choice but to conduct a lottery or other type of tie-breaker to avoid arbitrary or capricious action. See, e.g., MCI Cellular Telephone Company, FCC 84-61, Mimeo No. 34321, para. 57 [55 RR 2d 1215] (released March 6, 1984).

Id., 431.
The other is that

> there are no legal or procedural grounds for delaying the use of a tie-breaker lottery in an appropriate proceeding.

Id. In denying reconsideration of that 1984 order, 59 RR 2d 748, 750 (1985), we made clear, however, that we would not order a tie-breaker lottery until the parties to the particular proceeding in issue "had a full opportunity to address the legal issues involved." The parties to this proceeding have now had that opportunity and they have not presented us with any legal reason why a tie-breaker lottery is inappropriate in this case. Lacking any record establishing differences of decisional significance between the applicants, we conclude that the public interest, convenience, and necessity will be served by a grant of appropriate proceeding for using a tie-breaker lottery pursuant to our authority in Section 154(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(j) to conduct our proceedings "in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Our authority to order a lottery here, after the ALJ has conducted a hearing on the relevant comparative factors and has issued his *I.D.* containing his findings and conclusions, is separate from the authority conferred in 47 U.S.C. § 309(i) by the Communications Amendments Act of 1982, Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982. There random selection is permitted in lieu of a hearing after mutually exclusive applications are accepted for filing. In this case, the applicants have been accorded the full hearing rights provided in 47 U.S.C. § 309(e). Random selection is being used only because, on the basis of the record developed by the applicants in the hearing, decisional differences on the relevant issues cannot be found.[28] It is time to bring this proceeding to a close.

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[28] Thus, the requirements of 47 U.S.C. § 309(i), including the preferences, are inapplicable here.

25. The random selection of a permittee for a new MDS station in Joliet, Illinois, from among the applicants in this proceeding shall be conducted under the direction of the Office of Managing Director in conjunction with the Office of Secretary.[29] Advance notice of the time and place of the lottery shall be given to the parties to this proceeding and to the public. Following the random selection, the Commission shall announce the selectee and order a grant of the selectee's application and denial of the competing application.[30] The time for filing any petitions, motions, or appeals concerning the instant order or the order granting the selectee's application and denying the competing application shall commence with the public notice date of the latter order. The filing periods specified in the rules shall apply for such pleadings. For this random selection, Microband and RRAD shall have equal probability computed pursuant to 47 C.F.R. § 1.1623(b).

26. ACCORDINGLY, pursuant to 47 U.S.C. §§ 154(i), 154(j), 309(a),(e), IT IS ORDERED That the Exceptions of Microband Corporation to Initial Decision of Deputy Chief, Administrative Law Judge James F. Tierney, ARE DENIED.

27. IT IS FURTHER ORDERED That the requests for acceptance of late-filed pleadings filed by the Chief, Common Carrier Bureau, and RRAD, Inc., ARE GRANTED.

28. IT IS FURTHER ORDERED That Microband's May 1, 1986, Motion for Expedited Consideration, IS DISMISSED as moot.[31]

29. IT IS FURTHER ORDERED That a random selection of an application for a construction permit for a new MDS station to operate on Channel 1 in Joliet, Illinois, BE CONDUCTED under the direction of the Office of Managing Director in conjunction

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[29] To the extent they are pertinent, the provisions of 47 C.F.R. § 1.824(a)(1985) setting forth random selection procedures for Multichannel Multipoint Distribution Service are being used as a model in fashioning the procedures to be followed here. Since the parties have addressed the use of a lottery in their present pleadings, we do not believe another round of arguments on the lottery process is necessary.

[30] For the purpose of this case, authority is delegated to the General Counsel to issue the announcement and the order.

[31] In note 2 to its Motion, Microband asserts that RRAD has apparently lost interest in the station because it did not file exceptions or reply to Microband's exceptions. However, on January 13, 1986, the Review Board received both a Motion to File Late (see note 4, *supra*) and a Reply to Exceptions of Microband Corporation of America from RRAD. The accompanying certificate of service dated January 12, 1986, shows service on Microband's counsel by first class mail, postage prepaid.

with the Office of Secretary as set forth in paragraph 26 to this Decision.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

FCC 85D-69

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
RRAD, Inc.	CC Docket No. 84-1272 File No. 11022-CM-P-80
and	
MICROBAND CORPORATION OF AMERICA	CC Docket No. 84-1273 File No. 50048-CM-P-81
For Construction Permits in the Multipoint Distribution Service for a New Station at Joliet, Illinois	

Appearances

Roland Duncan, *pro se*, on behalf of RRAD, Inc.; Leo I. George, Esq., on behalf of Microband Corporation of America; and James O. Juntilla and Jacob W. Mayer, Esqs. on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

INITIAL DECISION OF DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

Issued: October 29, 1985; Released: October 31, 1985

Preliminary Statement

1. By *Memorandum Opinion and Order* (Order), Mimeo No. 1857, released January 11, 1985, the Chief, Domestic Facilities Division, Common Carrier Bureau (Bureau), pursuant to delegated authority, each of the applicants was found to be fully qualified, to be a licensee but mutually exclusive in the quest for grant of their applications. A comparative hearing, necessary to determine the successful applicant, was then predicated on the following issues:

(a) The relative merits of each proposal with respect to efficient frequency use, particularly with regard to the compatibility with co-channel use in nearby cities and adjacent channel use in the same city;

(b) the anticipated quality and reliability of the service proposed, including installation and maintenance programs; and

(c) the comparative cost of each proposal considered in context with the benefits of efficient spectrum utilization, and the quality and reliability of service as set forth in issues (a) and (b).

Also specified in that *Order* was that "Consideration of these factors shall be in light of the Commission's discussion in *Frank K. Spain*, 77 FCC 2d 20 1980)."

2. Wilco Vision was dismissed with prejudice as a party for failure to prosecute its application (Tr. 50). Proposed Findings of Fact and Conclusions of Law were timely filed by Microband Corporation of America (Microband) and the Bureau. A Motion to File Late was received October 15, 1985, from RRAD, Inc. (RRAD) noting that lateness was due to "illness." It would appear that no undue prejudice to the rights or interests of the other parties would ensue for that lateness. Accordingly, the Motion IS GRANTED and the accompanying Proposed Findings and Conclusions are accepted for consideration; Reply Findings were filed by Microband on October 21, 1985 and received from RRAD on October 22, 1985. A prehearing conferences was held on March 12, 1985. Efforts to achieve settlement among the parties proved unsuccessful, and the hearing was held on August 13, 1985.

3. While the proposals of the parties applicant generally reflect their respective positions in their affirmative cases in the evidence, the *residuum* or the remainder of those urgings, after the crucible of direct and cross-examination seem better articulated by the Bureau. In this respect, since these type proceedings seem rarely to reach active and completed ligitation and because of the more persuasive submission by the Bureau, in large measure, save for editorial and other preference of language, the Bureau's Proposed Findings have been adopted.

4. For the reasons hereinafter set forth, this, as an Initial Decision, SHALL CERTIFY this proceeding to the Commission for Consideration under 57 RR 2d 427 (1984) *Lottery Selection Among Applicants.*

Findings of Fact

5. At the outset of its Proposed Findings, the Bureau seeks "official notice" of certain public information and data respecting Joliet, Illinois, the city of proposed license and Will County, in which Joliet is located. Because the proceeding lacks such information, the Bureau suggests that that information would be useful as a background to decision. The Bureau, as advocate of the public interest, and customarily neutral in that role among or between applicant adversaries, its notions or suggestions are not only useful in achieving a fair and just resolution in these contests, more, they are usually most helpful to that end, thus, are welcome. Hence, its request for "official notice" is considered clearly relevant to a determination here and, thus, IS GRANTED, subject, as the Bureau footnotes, to a requested timely request by any of the parties to show the contrary. Thus, it may be found as set forth in the Bureau's Proposed Findings:

6. "Joliet, the seat of Will County is located in northeastern Illinois, approximately 32 miles from Chicago. It contained 82,000 of the 324,000 persons living in Will County in 1980. Joliet is within the predicted contours of the following commercial television broadcast stations:

Location	*Predicted Service*
WPWR-TV (Ind), Ch. 60, Aurora, Ill. (share time)	A
WBBM-TV (CBSO), Ch. 2, Chicago, Ill.	B
WBBS-TV (Ind), Ch. 60, Chicago, Ill. (share time)	A
WCFC-TV (Ind), Ch. 38, Chicago, Ill.	A
WCIU-TV (Ind), Ch. 26, Chicago, Ill.	A
WFLD-TV (Ind), Ch. 32, Chicago, Ill.	A
WGN-TV (Ind), Ch. 9, Chicago, Ill.	A
WLS-TV (ABC), Ch. 7, Chicago, Ill.	A
WMAQ-TV (NBC), Ch. 5, Chicago, Ill.	B
WSNS-TV (Ind), Ch. 44, Chicago, Ill.	A
WFBN-TV (Ind), Ch. 66, Joliet, Ill.	A

7. There are several subscription television services (STV) licensed in the Chicago area; however, Station WFBN-TV in Joliet is not currently using its STV authorization. There are two STV stations in Chicago proper: WCIU-TV, Ch. 26, is not currently using its authorization while WSNS-TV, Ch. 44, has 85,000 basic subscribers and 45,000 late night subscribers, charges $24.95 monthly for basic service, and charges $5.95 for a late night option.

8. The Chicago metropolitan area also has several satellite master antenna television systems in operation: Cablecom Corp. (15 operational systems with others under construction serving 3,500 subscribers); Comco Electronics, Inc. (17 locations serving 2,700 subscribers); and Satellink Corp. (8 Chicago locations with a total of 3,100 subscribers in 4 cities). Cable television service is available in Joliet as part of a 40-channel system that has 16,000 subscribers over a larger area. (Sources: *Broadcast/Cablecasting Yearbook 1984; Television and Cable Factbook (Stations Volume 1985).*"

RRAD, Inc.

9. Roland Duncan, President of RRAD, stated that he will receive a turnkey MDS system provided by Electronics, Missles and Communications, Inc. (EMCEE) and EMCEE will also provide all technical support necessary for installation.[1] RRAD plans to construct a 10-watt MDS station to operate from a tower site South Southwest of Joliet using an omnidirectional antenna and urges that use of that site will minimize interference from adjacent channel MDS stations (RRAD Ex. A)

10. Duncan further states that EMCEE would train personnel for maintenance and that they would problem solve by telephone or on site depending on the difficulty of problems presented (RRAD Ex. D). RRAD or Duncan also submits that being local to the area it would be better qualified to serve Joliet "in the interest of free market and to assure competitive forces in the MDS field" (RRAD Ex. E).

11. Yet, these RRAD claims do not find more precise support in the evidence of an agreement with EMCEE other than, as the Bureau notes, a "five-year old correspondence from EMCEE," which does not reflect that a contract was offered or accepted by RRAD and that, indeed, that correspondence seems to relate, in part, to a 100-watt MDS proposal rather than a 10-watt proposal for Joliet (RRAD Ex. 5, Band C; Tr. 93). To this situation, Duncan related that he had been told that there would be "minimal" changes in EMCEE's proposal and that the prices listed in RRAD's Exhibit B were no longer available (Tr. 92).; that EMCEE had refused to enter into a contract until RRAD

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[1] In its Reply Findings, RRAD seeks to bolster its position in the record by offering Exhibits for receipt on evidence to substantiate its position that EMCEE has always been and its presently available to provide a turnkey operation. Of course, these are extra record offerings, and thus, are impermissible as the record of hearing has been closed.

obtained a permit (Tr. 93). RRAD's original tower site appears no longer available; thus, RRAD now suggests that should it receive the grant here it intends to propose the use of three sites which it believes will then be available (Tr. 99-101). As the Bureau observes, some confusion may be at hand in the matter of RRAD's tower site inasmuch as both Microband and RRAD initially proposed to locate their transmitter on Station WCCQ-FM tower; that the application can be inspected to reflect that fact.

Microband

12. Microband proposes to operation a 10-watt MDS station from the tower of Station WCCQ-FM located South Southwest of Joliet, Illinois; also it plans to use an Andrew 63152(H) omnidirectional antenna with a Towsend Type TMD-10XT transmitter (Microband's Ex. A); that installation will be performed by qualified persons who have made similar installation on the part and that prior to service tests the station will be inspected by its engineer; that the station will be maintained by a qualified company in the area; further that Microband has an engineering staff on-call 24 hours a day to handle emergencies and has a stock of MDS spare parts which are available for immediate shipment if needed for replacement (Microband Ex. B); and that its proposed Joliet status has been designed so as not to preclude the possibility of MDS stations in other communities (Microband Ex. C).

13. In its Reply Findings, Microband disputes the suggested uncertainty of its witness "coupled" with its Exhibits in evidence reinforces its quality maintenance proposed and overall plan, and that as RRAD appears to concede, "Microband is far superior . . ."

14. Microband's proposed station would be serviced by the same station which maintains its Chicago MDS station, albeit the record reveals a certain uncertainty about this (Tr. 58, 69, 81).

Conclusion

15. As the Bureau notes in its submission, the applicants "made only minimal showings" in their direct cases under the given issues. Perhaps, this may be due in part to a dearth of precedent in these type proceedings though consideration of the factors underlying those issues was geared and pointed to in the

Designation Order to the discussions under *Frank K. Spain*, 77 Fcc 2d 20 (1980).

16. While both applicants appear to have certain imperfections in their responses to the given issues—RRAD's principal seeming inaccurate account of a more realistic assurance of commitment by the proposed turnkey contractor and related confusion on such matters as the parameters of the proposed transmitting systems; nevertheless, it appears that the turnkey agreement would be obtained were RRAD to receive the grant here and RRAD's seeming other faulty knowledge could be readily enhanced by a little more sophisticated technical education, a matter easily within the talents of RRAD's principal; Microband's equally uncertain posture concerning the proposed servicing facility of its station, disputed in its Reply Findings, these seem simply that, imperfections—clearly not substantial defects—but disabling to neither applicant as to eligibility for qualification for the license in contest and, comparatively, will give rise to no significant differences between the two. RRAD through its principal was, of course, prosecuting its application in the less talented fashions of members of the Bar; yet, its imperfect presentation in the evidence, in no way, undermined the essentials needed and expected. On essentials, then, the parties are in a dead heat.

17. RRAD's notion of maintaining "a spirit of fairness and completeness" premised on the fact of Microband's being "geared toward 135 station" and it being "geared toward one" has a certain attraction to it as a notion. Yet, nothing in the issues given their broadcast consideration and rational depth would permit this relativity easy determination. Hence, predictably under the evidence, each applicant seems able to demonstrate the efficient use of the proposed frequency with acceptable quality and reliability and with comparable costs, taking into account, as RRAD urges, "economies of scale" that would be in place because of Microband's multiplicity of MDS stations, but that this would seem to be "offset by a much higher overhead cost."

Ordinarily, one might pause shifting greater onus to the agency, where burdens already may be too numerous; principally because the Bureau in its prudence has footnoted an avenue of resolution, should the result reached here win the day—as it has—it is now concluded that this proceeding BE CERTIFIED to the Commission for consideration under *Lottery Selection Among Applicants*, 57 RR 2d 427, 430, 431 (1984).

IT IS SO ORDERED.[2]

FEDERAL COMMUNICATIONS COMMISSION

JAMES F. TIERNEY, *Deputy Chief Administrative Law Judge*

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[2] This, as an Initial Decision, while not the customary disposition, would nevertheless be subject to review and appellate rights reposing in Rule 1.276.

License, Revocation
Orders to Show Cause

Applicant directed to show to cause why licenses of radio stations WMJM and WFAV-FM should not be revoked as a result of alleged abuse of distress sale processes. Notice of Apparent Liability for forfeiture for violation of Section 310(d) of Communications Act of 1934, as amended.
—*Silver Star Communications*

FCC 86-172

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Silver Star Communications — Albany Inc.

Licensee of Radio Stations WMJM and WFAV-FM Cordele, GA

Order to Show Cause Why the Licenses of WMJM and WFAV-FM, Cordele, GA should not be revoked

ORDER TO SHOW CAUSE AND NOTICE OF APPARENT LIABILITY

Adopted: April 11, 1986; Released: April 17, 1986

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the licenses of Silver Star Communications — Albany, Inc. (hereinafter "Silver Star") for Radio Stations WMJM and WFAV-FM, Cordele, GA; and (b) the results of its investigation into the alleged abuse of the Commission's distress sale processes[1] by the

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[1] *See Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978), and *Clarification of Distress Sale Policy*, FCC 78-75, 44 RR 2d 479 (1978) *Grayson Enterprises, Inc.*, 77 FCC 2d 156 (1980). In order to

principals of Silver Star in connection with the acquisition and subsequent operation of these radio stations.[2]

2. Information now before the Commission as a result of its investigation raises serious questions as to whether Silver Star possesses the qualifications to be or remain a licensee of the captioned radio stations. This information has come to the attention of the Commission since its grant of assignment of license applications to Silver Star and, if substantiated, could warrant revocation of the licenses of the station.[3]

3. Accordingly, IT IS ORDERED, That pursuant to Section 312(a)(2) of the Communications Act of 1934, as amended, Silver Star IS DIRECTED TO SHOW CAUSE why the licenses for Radio Stations WMJM and WFAV-FM Cordele, GA, should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether the principals of Silver Star abused the Commission's distress sale process in connection with the termination of the hearing proceeding and the Commission's related grant of assignment of license applications in MM Docket Nos. 83-47 through 83-49 (File Nos. BAL-831004GS; BAL-831004GT; BALH-831004GU and BALH-831004GV).

(b) To determine whether Silver Star, as applicant in BAL-831004GT and BAL-831004GU, complied with the provisions of Section 1.65 of the Commission's Rules by keeping the Commission advised of substantial and significant changes as required by Section 1.65 and, if not, the effect of such non-compliance on the Commission's distress sale process.

(c) To determine whether Silver Star, in violation of Section 310(d) of the Communications Act of 1934, as amended, transferred control of Stations WMJM and WFAV-FM without a finding by the Commission that the public interest, convenience and necessity would be served thereby and if so, whether such transfer further constituted an abuse of the Commission's distress sale policy.

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increase minority ownership in the broadcast industry, the Commission's distress sale policy permits licensees whose renewal applications or licenses have been designated for hearing on basic qualification issues to transfer or assign their licenses, at no more than seventy-five percent of fair market value, to applicants with a significant minority ownership interest. Parties to a proposed transaction are expected to demonstrate how the sale would further the important goals of the policy. The Commission has stated that all such transactions will be scrutinized to avoid abuses. 68 FCC 2d 983.

[2] The principals of Silver Star are Dr. John Robert E. Lee, a minority and 51% shareholder, and Charles E. Finney, a non-minority and 34% shareholder, with the remaining stock held by Willie J. Nunnery (5%), Charles Stovall (5%), Fredrick X. Halloway (3%) and Bernard Restuccia (2%).

[3] Section 312(a)(2) permits the Commission to revoke a station license "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application."

(d) To determine, in light of the evidence adduced under the foregoing issues, whether Dr. John Robert E. Lee and other principals of Silver Star possess the requisite qualifications to be or remain licensees of the captioned radio stations.

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, is directed to serve upon Silver Star, within thirty (30) days of the release of this Order, a Bill of Particulars with respect to Issues (a) through (d) above.

5. IT IS FURTHER ORDERED, That pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the burden of proceeding with the evidence and the burden of proof shall be upon the Mass Media Bureau as to issues (a) through (e) inclusive.

6. IS IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the licensee, pursuant to Section 1.91(c) of the Commission's Rules, in person or by attorney, shall file with the Commission within thirty (30) days of the receipt of the Order to Show Cause a written appearance stating that it will appear at the hearing and present evidence on the matters specified in the Order. If the licensee fails to file an appearance within the time specified, the right to a hearing shall be deemed to have been waived. *See* Section 1.92(a) of the Commission's Rules. Where a hearing is waived, a written statement in mitigation or justification may be submitted within thirty (30) days of the receipt of the Order to Show Cause. *See* Section 1.92(b) of the Commission's Rules. In the event the right to a hearing is waived, the presiding officer has been designated, will terminate the hearing proceeding and certify the case to the Commission in the regular course of business and an appropriate order will be entered. *See* Section 1.92(c) and (d) of the Commission's Rules.

7. IT IS FURTHER ORDERED, That if it is determined that the hearing record does not warrant an Order revoking the license of Silver Star Communications — Albany Inc. for Radio Stations WMJM and WFAV-FM, it shall also be determined if Silver Star has willfully or repeatedly violated Section 310(d) of the Communications Act of 1934, as amended (unauthorized transfer of control). If so, it shall also be determined whether an Order for Forfeiture shall be issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, in the amount of $20,000 for the willful or repeated violation of Section 310(d) of the Communications Act of 1934, as amended.

8. IT IS FURTHER ORDERED, That this document constitutes a Notice of Apparent Liability for forfeiture for violation of Section 310(d) of the Communications Act of 1934, as amended. The Commission has determined that, in every case designated for hearing involving revocation or denial of assignment, transfer, or renewal of license for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Since the procedure is thus a routine or standard one, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of the case should be; that judgment is, of course, to be made on the facts of each case.

9. IT IS FURTHER ORDERED, that the licensee may transfer freely its other broadcast stations or acquire other broadcast stations, unless and until it is otherwise directed.[4]

10. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, send a copy of this Order by *Certified Mail — Return Receipt Requested*, to:

Silver Star Communications — Albany, Inc.
1115 14th Street
Columbus, GA 31901

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[4] *See Transferability of Broadcast Licenses*, FCC 83-65, 53 RR 2d 126 (1983) and *Metroplex Communications of Florida, Inc.*, FCC 84-244, released June 1, 1984.

Petition Dismissed
Private Land Mobile Radio Service

Petition to simplify the current licensing procedures for end users of SMR systems dismissed pursuant to authority contained in Sec. 1.407 of rules. Report and Order in PR Docket 85-302 provides much of the relief requested by petitioners as it eliminates many of the occasions when SMR end users have to file modification applications.
—*Specialized Mobile Radio*

FCC 86-231

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Amendment of Part 90 of the Commission's Rules to Modify Application Requirements for End Users of Specialized Mobile Radio Systems	RM-5125

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1986; Released: May 12, 1986

BY THE COMMISSION:

Background

1. The National Mobile Radio Association (NMRA) and the American SMR Network Association, Inc. (ASNA), two organizations representing licensees of Specialized Mobile Radio (SMR) systems, have independently petitioned the Commission to simplify the current licensing procedures for end users of SMR systems.[1]

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[1] NMRA's petition was filed on May 29, 1985. ASNA's petition was filed on July 10, 1985. The two petitions were consolidated into one proceeding because of their similarity. Public Notice of RM-5125 was given on August 12, 1985, in Report No. 1532. Timely-filed comments on the petitions were received from ASNA, Motorola, Inc. and the National Association for Business and Educational Radio, Inc. (NABER). Timely-filed reply comments were received from NMRA.

2. Petitioners claim that the current procedures for licensing the end users of an SMR base station facility are overly complex and cause unnecessary paperwork for both the end user and the Commission's staff. Petitioners propose various ways to simplify the license application and license modification process for end users of SMR systems.[2]

3. NMRA proposes that the Commission adopt "fleet licensing" for end users of trunked SMR systems.[3] Under this approach, the SMR operator would only indicate the maximum number of mobile units the operator plans to serve. End users operating under the SMR operator's "fleet license" would be solely responsible for complying with the Part 90 technical standards applicable to their mobile and control stations. Alternatively, NMRA proposes a "short form" version of the Form 574 that would be printed using the same format as FCC Form 572, Temporary Permit to Operate a Business Radio Station. As an exhibit to its petition, NMRA attached a facsimile Form 572 that it had altered to serve as a sample short form 574.[4]

4. ASNA, noting that it can take significant time for the Commission to develop and implement a new or revised form, proposes changes that would provide more immediate relief. Under ASNA's proposal, we would reduce the amount of information end users have to supply on the application. ASNA would have us delete or substantially modify the following data elements on the Form 574:

(a) Frequencies (SMR end users would just list the call sign(s) of their associated SMR system(s));[5]

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[2] Throughout this *Notice* we discuss methods for simplifying procedures for trunked SMR end users but not for conventional SMR end users. We do this because end users of conventional SMR systems operate on a single frequency pair only and therefore do not encounter the same problems as end users of trunked systems.

[3] "Fleet licensing" is a procedure under which the SMR base station licensee would also be authorized for all associated mobile stations, control stations and control points. This would relieve end users from applying for a separate authorization to operate their mobile units and control stations. Fleet licensing would impose on the SMR base station licensee the obligation of ensuring that all facilities be used only by eligible entities and that all uses of the system be in accordance with Part 90. For a full discussion of fleet licensing including the reasons we rejected it in favor of a system providing for temporary licensing of end users, see the *Report and Order* in PR Docket No. 79-335, *Temporary Licensing, 800 MHz*, 89 FCC 2d 638 (1982).

[4] Form 574 is the FCC application used to apply for private land mobile facilities.

[5] According to ASNA, this would relieve the trunked SMR end user from completing Form 574-A, Supplemental Information for Trunked and Conven-

(b) Emission designator;

(c) Effective Radiated Power;

(d) Area of Operation;

(e) Location of Primary Control Point (SMR end users would just provide the telephone number for the primary control point);

(f) Eligibility (SMR end users would just cite the Part 90 rule section that establishes their eligibility);

(g) System License.

ASNA asserts that we can and should make these changes immediately, without a rulemaking, since they are procedural in nature and will reduce burdens on licensees and applicants.

5. Petitioners note that FCC Form 574 was primarily designed as an application for a system license, for which information is needed regarding one or more base/repeater stations, one or more control stations and a group of mobile units. One problem with the form is that it only has space to accomodate a maximum of 20 frequencies. Because the end user of a 20-channel trunked SMR system employs 40 frequencies (its host SMR base station transmit frequencies are paired with its own mobile unit transmit frequencies), end users must file *two* Form 574s—one to cover the 20 frequencies used by the control station, and another to cover the 20 frequencies used by mobile units.

6. ASNA observes that unlike most other private land mobile radio applicants, the trunked SMR end user does not select the frequencies on which it will operate. An end user makes a business decision to obtain mobile communications service from one or more SMR base station licensees. The end user is then licensed to operate on the mobile and control frequencies associated with its host SMR base station. ASNA notes that:

> once the FCC is notified that a particular end user will receive service from a designated SMRS licensee, it knows that the user must operate on the mobile/control side of that licensee's channel pairs. Listing the specific frequencies is superfluous as long as the SMRS system provider is identifed. (ASNA *Petition*, p. 5)

7. Petitioners also note that Section 90.135 (47 C.F.R. §90.135) requires the end user of a SMR system to file a Form 574 requesting modification of its authorization every time its host

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tional Systems, which requires information on the name and call sign of the SMR operator.

SMR system adds or deletes frequences.[6] ASNA suggests that if we decide to invite comment on Form 574 revisions, we at least relieve SMR end users during the pendency of the proceeding from the duty to modify their authorizations every time their host SMR operator adds or deletes channels. ASNA recommends that we allow SMR base station licensees in these circumstances to provide a list of all their end users, the users' call signs and number of mobile units so that the Commission can issue superseded end user licenses.

Discussion

8. We believe there is merit to some of the points raised by petitioners. Indeed, some of the very concerns cited by NMRA and ASNA led us today to simplify substantially the licensing requirements for end users of SMR systems. One of the main concerns of the petitioners is the paperwork required when an SMR end user must file an application for modification indicating either the addition or deletion of channels each time its host SMR operator adds channels to its system or has channels deleted pursuant to the Commission's channel recovery program. The *Report and Order* in PR Docket No. 85-302 we adopted today provides much of the relief requested by the petitioners as it eliminates many of the occasions when SMR end users have to file modification applications.[7] Under the terms of the *Report and Order*, end users will no longer have to file modification applications: (1) when their host SMR system is assigned to another entity; (2) when the end user obtains service from an additional SMR operator;[8] or (3) when its host SMR operator adds or deletes channels.

9. Thus, that *Report and Order* provides, and in some cases goes beyond, the relief sought by petitioners. As noted earlier, ASNA requested that we relieve SMR end users from having to

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[6] An SMR operator can be granted additional frequencies when its existing system is fully loaded according to Sections 90.364 or 90.627 of the Commission's rules. Conversely, an SMR operator can lose frequencies through the Commission's channel recovery program, if systems are not constructed or loaded as required by Sections 90.366 or 90.631 of the rules.

[7] Amendment of Part 90 of the Commission's Rules Governing the Application Filing Procedures for SMRS Operators and End-Users in the 800 MHz Private Land Mobile Band, FCC 86-232, adopted May 6, 1986. *See also* the *Notice* in this proceeding, FCC 85-548, released October 17, 1985, 50 Fed. Reg. 42732 (October 22, 1985).

[8] However, a modification application must be filed by the end user if its units are to be counted towards the additional SMR operator's loading credit. *See Report and Order*, PR Docket No. 85-302, *supra*, para. 15.

modify their authorizations every time their host SMR operator adds or deletes channels. ASNA suggested the Commission instead just require the SMR base station licensees to provide us a list of all their end users, the users' call signs and number of mobile units so that the Commission could issue superseded end user licenses. The *Report and Order* establishes the principle that end users of SMR systems may operate on any frequency licensed by the SMR operator from whom they obtain service. This not only relieves SMR end users from the requirement to file applications for modification when channels are added or deleted, but also removes any need for the SMR operator to notify the Commission.

10. Petitioners were also concerned about the paperwork required when an end user decides to take service from an additional SMR operator. Under the terms of the *Report and Order*, end users will only have to file a letter notification in these circumstances rather than a modification application. Thus, end users will be able to enter into roaming agreements quickly with a minimum of paperwork. As roaming agreements become increasingly popular, we believe this rule change will save end users many hours of paperwork.[9]

11. We recognize that fleet licensing would eliminate the need for separate licensing of end users of SMR systems. As recently as 1982, we conducted an extensive proceeding to explore the benefits of fleet licensing.[10] After analysis and study, we declined to implement the proposal. Inherent in the fleet licensing approach is a transfer of responsibility for the proper operation of the mobile units and control stations from the end users themselves to the SMR operator. Under fleet licensing, the SMR base station licensee would be obligated to assure that all facilities are used by Part 90 eligibles only, and that the uses of the system are permissible under Part 90. Further, the SMR base station licensee would be responsible for ensuring that all end users observed applicable technical standards when operating their mobile units and control stations. The added responsibility imposed on the SMR base station licensee was one of the primary reasons we declined to adopt fleet licensing. This concern remains

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[9] Roaming agreements allow end users to operate their mobile units outside the confines of the geographical area served by an SMR base station operator. For example, an end user of a New York City-based SMR system could enter into a roaming agreement with an SMR system based in Trenton, New Jersey, in order to allow the mobile units to continue operating while driving towards Philadelphia on the New Jersey Turnpike.

[10] *Report and Order*, PR Docket No. 79-335, ,*supra*, note 3, 89 FCC 2d at 639.

valid. We are not now prepared to revisit the complex issues addressed in the fleet licensing proceeding.

12. We likewise decline to pursue NMRA's suggestion that we adopt a short form version of the Form 574. Form 574 is used by all private land mobile radio applicants, not just end users of SMR systems. Therefore, revision of the form is an undertaking that will require considerable study and time. While we do intend to reevaluate the form to assure that paperwork burdens are minimized, we are not prepared to do so at the present time. We believe the substantial relief afforded in PR Docket No. 85-302 will go a long way to alleviate unnecessary burdens on SMR end users.

13. Likewise, we will not pursue ASNA's suggestion that the Commission delete or substantially modify the seven data elements from the Form 574 listed earlier in paragraph 4. In the subparagraphs below, we discuss reasons why some of these data elements cannot be deleted or substantially modified:

(a) *Frequencies*: ASNA would have the SMR end user provide only the call sign of its host SMR, rather than list frequencies. This is not now possible because the data base cannot make the linkage between the host SMR operator's call sign and the end user's call sign.

(b) *Emission Designators*: ASNA would delete this data element because the end user is only capable of employing emissions which are technically compatible with the SMR base station transmitter. However, international treaty agreements require the collection of this information. Additionally, we use this information to resolve interference cases that may arise even where international agreements are not involved.

(c) *Area of Operation*: We recognize that end users are limited to operating in the area covered by their host SMR base station. However, information on the area of operation is a critical record link in the Commission's private land mobile data base structure.

(d) *Location of Primary Control Point*: ASNA would only have the telephone number of the primary control point provided. The Commission requires the full address of the primary control point, however, because the location of the control station (typically the end user's place of business) is not always the same as the end user's mailing address.

(e) *Eligibility*: Petitioners and commenters asserted that only a rule section cite to Part 90 should be required to demonstrate eligibility. End users of SMR systems are required, as are all private land mobile radio applicants, to establish their eligibility under Part 90 of the Rules. While Part 90 eligibility is expansive, and includes commercial and non-commercial activities, a narrative statement allows us to make an informed determination of an applicant's eligibility. We are aware of a number of instances in which SMR end user applicants have cited eligibility in the Business

Radio Service (47 C.F.R. §90.75(a)(1)), and yet, an examination of their narrative statement found them to be engaged in activities that would make them ineligible for the Business Radio Service.

Conclusion

14. For the reasons discussed above, we decline to implement measures suggested by the petitioners. Accordingly, IT IS ORDERED That the petitions for rulemaking, RM-5125, filed by NMRA and ASNA are DISMISSED, pursuant to the authority contained in Section 1.407 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Frequency Equitable Distribution of Under 307(b)

In hearing matter of mutually exclusive applications for authority to operate on Clear Channel frequency 1200 kHz, Review Board reversed ALJ's grant based on a contingent standard comparative issue. The Board pointed out that because the ALJ had treated one of the applicants, Suburbanaire, solely as a Milwaukee applicant (Suburbanaire had proposed dual city licensing serving West Allis and Wisconsin), he had committed reversible error in reaching the corollary conclusion that neither applicant (the other proposed Chicago as its city of license) was entitled to a 307(b) preference. The West-Allis-Milwaukee applicant was awarded a 307(b) preference for proposing to provide a first nighttime transmission service to West Allis.

—*Suburbanaire, Inc.*

MM Docket No. 84-418

FCC 86 R-47

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications	
SUBURBANAIRE, INC. WAWA(AM), West Allis-Milwaukee, Wisconsin	MM DOCKET No. 84-418 File No. BP-801222AA
CID BROADCASTING, INC. Chicago, Illinois	MM DOCKET NO. 84-421 File No. BP-810105AE
For Construction Permit for a New AM Station	

Appearances

Donald E. Ward and *Eric S. Kravetz* on behalf of Suburbanaire, Inc.; and *Stephen A. Sharp, Virginia S. Carson* and *Miriam C. Kircher* on behalf of CID Broadcasting, Inc.

DECISION

Adopted: July 24, 1986; Released: August 1, 1986.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), BLUMENTHAL, AND ESBENSEN.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Suburbanaire, Inc. (Suburbanaire) and CID Broadcasting, Inc. (CID) for authority to operate on Clear Channel frequency 1200 kHz in West Allis-Milwaukee, Wisconsin and Chicago, Illinois, respectively. Suburbanaire, licensee of station WAWA(AM), West Allis, seeks to modify the facilities of WAWA so as to provide a fulltime service to West Allis and Milwaukee. CID, on the other hand, proposes to serve Chicago with a new transmission service. By *Hearing Designation Order*, 49 Fed. Reg. 19732, published May 9, 1984, these applications, along with four others no longer in the contest,[1] were designated for hearing on various issues including, *inter alia*, one to determine, pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C § 307(b), which of the proposals would best provide a fair, efficient, and equitable distribution of radio service, and on a contingent standard comparative issue. In an *Initial Decision*, FCC 86D-18, released March 18, 1986, presiding Administrative Law Judge (ALJ) John M. Frysiak granted CID's application after holding that neither applicant was entitled to a Section 307(b) preference and that CID was the superior applicant under the standard comparative issue. The proceeding is now before the Review Board on exceptions filed by Suburbanaire and limited exceptions by CID. We have reviewed the *I.D.* in light of the exceptions, the oral argument held before a panel of the Review Board on July 18, 1986, and our examination of the record. We adopt the findings of fact in the *I.D.*, except as substantially modified herein, but we reverse the ALJ's conclusions under the Section 307(b) issue and conclude that a grant of Suburbanaire's application would better serve the public interest, convenience and necessity.

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[1] The *I.D.* also denied the application of Stevens Broadcasting Corporation (Stevens). Stevens, however, failed to file exceptions to the *I.D.*, and its application will therefore be dismissed with prejudice pursuant to Section 1.276(f) of the Commission's Rules, 47 CFR § 1.276(f).

2. This case now boils down to the competing desires of the licensee of WAWA-AM, Suburbanaire, and CID to take advantage of the Commission's 1980 *Clear Channel* proceeding[2] by establishing a fulltime, Class II-B standard broadcast (AM) station on 1200 kHz, Suburbanaire in West Allis-Milwaukee[3] and CID in Chicago, Illinois. Because only one of the two remaining applications can be granted compatibly, our review of the *I.D.* must first consult with Section 307(b) of the Communications Act, 47 U.S.C. § 307(b), to determine whether either of the applied-for communities is entitled to a preference under the statute. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955); *Beaufort County Broadcasting Co. v. FCC*, Nos. 84-1265, 84-1384 (D.C. Cir. decided April 11, 1986); *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132 (D.C. Cir. 1985) (*aff'g* § 307(b) preference to Portage, Michigan over Kalamazoo) (remanded on other grounds). For as we stated with regard to *Allentown Broadcasting, supra*, and its progeny in *Debra D. Carrigan*, 100 FCC 2d 721, 723 n. 3 (Rev. Bd. 1985)[4]:

> That case [*Allentown*] holds that, where a § 307(b) choice could be made between mutually exclusive applications for conflicting 'communities,' the FCC can grant the application proposing to serve the community with the greater need for a new broadcast service, without first determining which applicant was better qualified on a standard comparative basis.

Unfortunately, but for reasons attributable in part to Suburbanaire's amended thrust towards Milwaukee (*see supra* note 3), the *I.D.* effectively ignored Suburbanaire's application to provide the first nighttime transmission service to be licensed, even if dually with Milwaukee, to West Allis, Wisconsin.[5] By treating Suburbanaire solely as a Milwaukee applicant here, and concluding that Milwaukee and Chicago were about equally well-served, *I.D.*, paras. 49–51, the *I.D.* commits reversible error in reaching the corollary conclusion that neither remaining applicant is entitled to a preference under Section 307(b), *see id.*, para. 51. While our reasons for reversal might be, in view of the brief discussion above, nearly self-explanatory, despite the fact that Suburbanaire's Section 307(b) preference for the first nighttime transmission service to be licensed directly to West Allis is proportionately diluted by its dual city licensing proposal, we use this opportunity to address several heretical Section 307(b) theories bobbing about in this case, lest others be tempted to launch legal jetsam similarly unseaworthy.

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[2] *Clear Channel AM Broadcasting*, 78 FCC 2d 1345 (1980) (subsequent history omitted).

[3] WAWA-AM is currently licensed only to the community of West Allis, and Suburbanaire's original application in this proceeding proposed no city-of-license change. However, by letter of December 29, 1980, (former) counsel for Suburbanaire tendered an amendment to its application seeking a city-of-license change to West Allis-Milwaukee. *See* Letter of December 29, 1980 from Harry P. Warner, Esq. to Secretary, Federal Communications Commission, which requested amendment of Suburbanaire's application to "strike 'West Allis' and substitute in lieu thereof 'West Allis-Milwaukee' . . . [o]n page 1, Section I, under Station Location and City." Although that letter further stated that "[a]pplicant is petitioning the Commission for dual city *identification*" (emphasis added), it is clear beyond counsel's careless terminology that his applicant was not merely seeking dual city "*identification*" under 47 CFR § 73.1201, which entails no addition burdens on the licensee, but was seeking dual city *licensing* under 47 CFR § 73.1120, which does entail such burdens, foremost of which are the establishment of a studio in *both* cities-of-license and the origination of "a substantial number of local live programs from each place." *Id.* We, therefore, treat Suburbanaire as a West Allis-Milwaukee applicant.

[4] Commission *review denied*, FCC 86-317, released July 14, 1986.

3. Initially, we decline CID's invitation to extend the *Huntington* doctrine[6] to the situation at bar.[7] In brief, that doctrine holds:

> that where a suburban applicant proposes a high-powered frequency covering a central city, that applicant should have no determinative section 307(b) advantage over other applicants in the urban area.... *Huntington's* premise is that where integrally related communities constitute a single metropolitan transmission service area, individual communities' needs should be presumed satisfied by the aggregate of stations in the area.

Beaufort County, supra, slip op. at 8. Whereas the *Huntington* doctrine heretofore has been applied only where *all* of the competing applicants are seeking to be licensed in the *same* urbanized area,[8] CID invokes the doctrine here, although Chicago and West Allis-Milwaukee are clearly not of the same urbanized area.[9] Just as the *Beaufort County* court properly refused "to extend the [*Huntington*] policy to other contexts absent a convincing demonstration that such an extension is necessary to satisfy the minimum requirements of rationality," slip op. at 19, we refuse to extend *Huntington*—even were we so empowered—to situations such as the instant example. Rationality makes no such demand, for it is certain that *if* Suburbanaire were to be considered (as CID would have it) a Milwaukee-only applicant, no application of *Huntington* doctrine would be necessary to deprive Suburbanaire of any Section 307(b) preference; Chicago and Milwaukee, both being equally well-served, Section 307(b) would be altogether immaterial to this case, and the instant licensing decision would turn to the standard comparative criteria enunciated under the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). *E.g., Debra D. Carrigan, supra; Hispanic Owners, supra* note 8; *Arizona Number One, supra* note 8; *Faye & Richard Tuck, supra* note 9.

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[5] Suburbanaire is also the licensee of WKUM(FM), which, of course, has nighttime authority; but WKUM(FM) is licensed *only* to Milwaukee. *See I.D.*, para. 16.

[6] *Huntington Broadcasting Co.*, 5 R.R. 721 (1949), *reh. denied*, 14 FCC 563 (1950), *aff'd*, 192 F. 2d 33 (D.C. Cir. 1951).

[7] CID Reply at 4–8.

[8] *See, e.g., Debra D. Carrigan, supra; see also Hispanic Owners, Inc.*, 99 FCC 2d 1180 (Rev. Bd. 1985) (no applicant for Albuquerque urbanized area awarded § 307(b) preference), *review denied*, FCC 86-316, released July 14, 1986; *Arizona Number One Radio, Inc.*, 103 FCC 2d 550 (Rev. Bd. 1986) (no applicant for Phoenix urbanized area awarded § 307(b) preference) (applications for Comm'n review pending).

[9] Just in passing, we note that the Commission's recent *Suburban Community Policy*, 93 FCC 2d 436 (1983) (*aff'd Beaufort County, supra*), tentatively declined to utilize the Census Bureau's SMSA or Urbanized Area concepts for

4. Moreover, before we could accept CID's extension of *Huntington* to cases not involving contexts in which *all* competing applicants propose to serve the *same* urbanized area, we would have to accept its deficient presumption, and the *I.D.*'s fatal error, that Suburbanaire is a Milwaukee-only applicant, and

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relevant purposes, *see id.*, at 457, but the Commission's search for a reliable standard seems stalled, *see Metropolitan Areas*, 48 Fed. Reg. 19, 428 (1983) (cited *Beaufort County*, slip. op. at 9 n.2), thereby causing appreciable uncertainty. *Compare Faye & Richard Tuck, Inc.*, 103 FCC 2d 936 (Rev. Bd. 1986) (no applicant awarded § 307(b) preference) (applications for Comm'n review pending) *with* Concurring Statement, *id.*, at 946 (*Huntington* doctrine should not have encompassed Waxahachie, Texas applicant). With due respect, however, we refer the Commission to the following language in the *Tuck* "Contingent Application for Review" at 8, which quotes the *1980 Census of Population*, Vol. 1, Chapter A, Part 45 at A-4 (new emphasis added) to state:

> Although the urbanized area and the Standard Metropolitan Statistical Area are closely related in concept, there are important differences. . . . The urbanized area consists of the physically continuously built-up territory around each larger city and thus corresponds generally to the core of high and medium population density at the heart of the metropolitan area. *In concept, a metropolitan area is always larger than its core urbanized area even if the metropolitan area is defined in terms of small building blocks, because it includes discontinuous urban and suburban development beyond the periphery of the continuously built-up area. The metropolitan area may also include some rural territory whose residents commute to work in the city of its immediate environs, while the urbanized area does not incude such territory.* In practice, because SMSA definitions use counties as building blocks, considerable amounts of rural territory with few commuters are often included.

It seems to us that the Census Bureau concept of "metropolitan area" may come as close as any for relevant FCC purposes, and could provide a definitive standard in the future.

is in essence entitled only to treatment accorded to the "Suburbanite Model" considerations discussed in *Debra Carrigan, supra*, 100 FCC 2d at 728–731.[10] As indicated hereinabove, the *I.D.* treated Suburbanaire's application as for a Milwaukee-only station, chiefly for the following reasons:

> In testimony at the hearing, Mr. Willie Davis, principal of Suburbanaire, Inc., further demonstrated that WAWA does not direct its programming efforts to the citizens of West Allis, where there are only 43 Blacks, but rather to the Black population in the Milwaukee SMSA (Tr. 65).

I.D. at para. 16. Had Suburbanaire's President (and 66 2/3% principal) so testified, and had other evidence corroborated the fact that the licensee had neglected, and intended to neglect, its West Allis city-of-license, our result might well here be different.[11] Yet, the record evidence not only fails to support such an incriminating notion, it proves quite the opposite. Thus, Suburbanaire's December 22, 1980 application was accompanied by an exhibit (No. 5) affirming its ascertainment of community needs, and included a December, 1980 study conducted by Ralph E. Brownlee, DBA, styled: *Survey Report for WLUM/WAWA West Allis, Wisconsin.* The report surveyed 150 persons from December 10–14, 1980, and indicates: "Area Surveyed: West Allis, Wisconsin." Nobody here challenged, or challenges, Suburbanaire's ascertainment process, and CID does not seriously assert that the licensee did not carry through in its post-1980, West Allis programming. Furthermore, while the *I.D.* relies on hearing transcript page 65 for its rather startling indictment, the transcript itself is otherwise, to wit:

> Q Mr. Davis, in Exhibit 1 you characterize the format of WAWA as black. Could you describe that for us, please?
>
> A Well, I think to the extent that it's a choice of music, public information and the coverage of public issues of concern within the black community, in the case of the black appeal of the radio station.

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[10] In this regard, we concede Suburbanaire's impropitious appellation. Perhaps "Traditional Broadcasting, Inc." would be more "comfortable," *see Carrigan* at 727–728. Well, what's in a name (*see, e.g., Absolutely Great Radio, Inc.*, 95 FCC 2d 1023 (1983) (reversed and remanded))?

[11] Indeed, had the record indicated a past failure to serve the needs, problems and interests of WAWA-AM's West Allis city-of-license, the Board would not have hesitated a trice to remand this case on a disqualifying issue against Suburbanaire. It is noteworthy, though, that CID sought no such issue, nor did the ALJ add one or make sustainable adverse findings and conclusions thereunder. For reasons explained in the text which follows, no such finds or conclusions would be justified.

> Q And does that format fill the broadcast day of WAWA?
>
> A No, not entirely because in the morning from 7:00 to 7:30 we have a talk show that is hosted by O.C. White, and it's very diversed and many issues are related to both the black community *and to the population of West Allis, Wiconsin.*
>
> Q Can you describe for us some of the topics that Mr. White has discussed in his show recently?
>
> A Well, I think he has discussed the typical issues over time involving employment, unemployment, housing, crime, education and, in particular, we have on occasions dealt with things we felt would—more or less of good *news items in West Allis, Wisconsin in particular.*

Tr. 65–66 (emphases added). On redirect examination, Davis was consistent:

> Q I'm sorry, but I'm talking about WAWA. Aside from an emphasis on black programming, has there been other programming—
>
> A Well, we have specifically, as I stated earlier, made reference to the fact that *we have specially designed programs to give special consideration to West Allis, our city of license.* So, there is no question that, during the course of this, *we have had programs on the air that reflected the needs and considerations of West Allis.*
>
> Q And in the future, if you get a full-time format, a full-time authorization, do you intend to essentially extend your present programming service into nighttime hours?
>
> A Yes, that is the intent and that has been the subject of discussion with the *two communities involved* to that end.

Id., at 80 (emphases added).

5. It is true that Davis did discuss (such as it might be) the "black" entertainment format of WAWA-AM, its purported attractiveness to certain black inhabitants of the Milwaukee area, as well as Suburbanaire's amendment request to have WAWA-AM dually licensed to Milwaukee in hopes of a stronger identification with its black community. But, Suburbanaire's is a *West Allis-Milwaukee* application; and even apart from the fact that the Commission's 1983 *Suburban Community Policy, supra,* no longer permits a competing applicant to challenge its competitor's intent to serve a smaller suburban community within an urbanized area, *see Beaufort County, supra,* slip op. at 9–13,[12] nothing in this

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[12] *See also Debra Carrigan, supra,* FCC 86-317 at para. 5; *Hispanic Owners, supra,* FCC 86-316 at para. 3, in which the Commission states that "[i]n *Suburban Community Policy*. . .[w]e determined that the intentions of an applicant who specifies a small [suburban] community *would no longer be questioned.*" (Emphasis added). *But see infa* note 23.

hearing record demonstrates that Davis intends to pack it in in West Allis or run for daylight from that city. That Suburbanaire also intends, as a dual city licensee, to focus more closely on what is brewing in Milwaukee does not altogether deprive that licensee of the preferential Section 307(b) benefit for providing, *pro tanto*, a first nighttime transmission service to be licensed directly to West Allis, Wisconsin, a sizeable, self-governing city of 63,932. *I.D.*, para. 17.[13] First fulltime transmission service licensed to West Allis, even if shared with Milwaukee, is certainly comparatively cognizable under Section 307(b). For the *I.D.* completely fails to record that[14]:

> West Allis is Wisconsin's sixth largest independent city (Suburbanaire Exhibit 3, p. 1). Were this not enough to establish that the city presumptively merits its own fulltime broadcast outlet, the record further shows that the city has its own local elected government comprised of a Mayor and ten person City Council representing five geographic wards (*Id.*). Its local government formulates and manages its own budget, enacts and enforces its own ordinances and zoning regulations, and operates separate administrative departments responsible for such matters as finance, health, housing, public works, engineering, water, sanitation, building inspection, legal affairs, and city planning (*Id.*). The city also has developed its own Master Plan, dealing with the location and quality of the various industrial, retail and residential areas within the city (*Id.*).

CID argues (Reply at 8–14) that Suburbanaire is not entitled to the protective "presumption" of the recent *Suburban Community Policy*, and even goes so far as to postulate that "Suburbanaire has failed to carry its burden of proof with respect to the 'transmission' aspect of Section 307(b)" in what (1) WAWA's signal will not cover all of West Allis; (2) its main studio is not in West Allis; and (3) Suburbanaire has not proposed specific programs for West Allis. While it might be that Suburbanaire should have been satisfied with its Section 307(b) "burden-the-hand," as it were, for West Allis, we find no such "burden" as CID posits in *Suburban Community Policy*. Indeed, CID constructs an "intent" burden of the very breed that the *Policy* was expressly intended to obviate. *See Land O'Lakes Broadcasting, Corp.*, 103 FCC 2d 758, 763–765 (Rev. Bd. 1986) (dually licensed Worthington-Columbus, Ohio licensee presumed to serve smaller, neighboring community of Worthington). Furthermore, as to its specific points: (1) WAWA-AM will substantially cover the population of West Allis and Milwaukee (over 95% of total population) v. CID's proposal to cover only approximately 72% of *its* city-of-license); (2) Suburbanaire's present studio is in Elm Grove, only "2 or 3" blocks from West Allis, and in full compliance with FCC studio location rules (*see* 47 CFR § 73.1125); and (3) Suburbanaire did propose to program specifically to West Allis (*see* Suburbanaire Exceptions at 6, 12–13; Tr. 74–75).

[13] Indeed, the Commission's *Clear Channel AM Broadcasting, supra*, was expressly intended to permit daytime- only facilities such as WAWA-AM to upgrade to a Class II–B on 1200 kHz so as to provide nighttime service to unserved and underserved communities. *See id. (passim).*

[14] Suburbanaire Br. at 4–6 (footnote omitted).

> Other indicia of its status as a substantial independent community, contained in the record but unmentioned in the *ID*, include the facts that West Allis has its own Police Department of 157 persons, and a Fire Department (including a Paramedic Unit) with 139 persons and fourteen pieces of equipment located at three stations (Suburbanaire Exhibit 3, pp. 1-2). The West Allis School District, administered by a nine-member Board of Education, operates twelve elementary schools, two junior high schools, and three high schools, while the West Allis Memorial Hospital offers medical and surgical inpatient care, obstetrics, radiation therapy, outpatient surgery, and 24-hour per day emergency service to the citizens of the community (Suburbanaire Exhibit 3, p. 2). The city has an economic base largely grounded in light and heavy industry, where 45% of its work force is employed, and there are wholesale and retail stores and a wide range of professional and banking services located in the downtown shopping district and in the smaller commercial strips located elsewhere in the city (*Id.*). Finally, the city offers its own social, cultural and recreational services, including a library system, 22 playgrounds, 15 recreational buildings or gymnasiums and a Senior Center for the use of its residents, who themselves have formed civic and social organizations including the West Allis Historical Society, Women of West Allis, and the West Allis Community Programmers (Suburbanaire Exhibit 3, pp. 2-3).

West Allis, unchallenged by CID as an entitled "community" for Section 307(b) purposes, is due a proportionate preference in acquiring its *first* licensed *fulltime* transmission service. *Cf. WHW Enterprises, supra* (applicants for first fulltime transmission service to Portage, Michigan entitled to dispositive § 307(b) preference over Kalamazoo applicant, even though signals of Portage applicants would also encompass larger, adjacent city of Kalamazoo).

6. On the other hand, we firmly reject Suburbanaire's unworthly attempt to garner a statutory Section 307(b) "reception" preference on the unprecendented proposition that Suburbanaire's "black" entertainment format will have special appeal to black Milwaukeeans.[15] First, we find that such a claim must be premised on an invidious racial stereotyping of the very character derided by the majority panel in *Steele v. FCC*, No. 84-1176 (D.C. Cir. decided April 1, 1985), slip op. at 13,[16] and we officially notice, for example, that Wynton Marsalis is revered in the black community for Bach as well as for Boogie, just as Whitney Houston is, at least, as popular in the "white" community as Juice Newton. Second, radio station entertainment formats come and go with the alacrity of designer hem lengths; and the quicksilver transfer of licenses, these days, is second only to

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[15] *See id.*, at 15-20.

[16] *Vacated and noted for en banc argument, Order* (filed October 21, 1985).

the madcap trading in vintage baseball cards.[17] As indicated in *Debra D. Carrigan, supra,* Section 307(b) addresses the needs and entitlements of competing "*communities*" for new or improved broadcast services, *not* on indigenous applicant (or audience) characteristics. 100 FCC 2d at 723 n. 3.[18] And certainly not on such ephemera as radio station entertainment formats, which may—and are—discarded at whim. *See FCC v. WNCN Listeners Guild,* 450 US. 582 (1981).

7. Finally, Suburbanaire's bid for Section 307(b) recognition for the "reception" of "black" entertainment to be promulgated by a black licensee smacks inescapably of the "nexus" theory rejected by the Commission and the court in *West Michigan Broadcasting Co. v. FCC,* 735 F.2d 601 (D.C. Cir. 1984), *cert denied,* 105 S. Ct. 1392 (1985). In interring the "nexus" theory in that underlying administrative case, the Commission made its position plain:

> Here, we reject any notion that the credit awarded for minority ownership should be dependent upon a nexus with a minority population in the proposed service area. Such an argument is wholly inconsistent with our best determinations granting full credit minority ownership without regard to the nature of any minority population, and holding that the public interest benefits and advantages of minority ownership are not dependent on proof that the minority owned station will specifically program to meet minority needs. In view of the continuing underrepresentation of minorities in broadcast ownership, and because minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation, it would be contrary to Commission policy to restrict credit according to the racial and ethnic composition of the proposed community of license or service area. Moreover, a nexus requirement would unduly restrict future expansion of minority broadcast ownership contrary to established Commission policy.

Waters Broadcasting Corp., 91 FCC 2d 1260, 1264-1265 (1982) (*aff'd sub nom. West Michigan*).[19] Along those same lines, this Board has declared:

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[17] The Commission's Mass Media Bureau reports that, out of the approximately 10,000 licensed commercial broadcast stations, 1875 of them changed hands in 1985, a 116% increase over 1984.

[18] Moreover, the Commission has squarely "rejected the contention that a particular racial or ethnic group should constitute a 'community' for [§ 307(b)] allocation purposes." *Riverside Amusement Park Co., Inc.*, 69 FCC 2d 1040, 1042 (1978) (and cases cited therein).

[19] Although we thoroughly agree with Chairman Fowler's Dissenting Statement in *Waters* (91 FCC 2d at 1267) that the courts in *TV 9, Inc. v. FCC,* 495 F. 2d 929, 942 (D.C. Cir. 1973), *cert denied,* 419 U.S. 986 (1974) and *Garrett v. FCC,* 513 F.2d 1056 (D.C Cir. 1975) did literally tie minority ownership with minority listenership, the *Waters* majority categorically eschewed the significance of a "nexus" between minority ownership and a minority population in the reception area, as did the *West Michigan* court affirming *Waters, see* 735 F.2d at 612-613. *See also Waters,* 91 FCC 2d at 1282, Dissenting Statement of

> "If diversity means anything, it means exposing persons of one cultural stripe to the possibly differing views of others with differing environmental backgrounds and experiences." *New Continental Broadcasting Co.*, 88 FCC 2d 830, 845 (Rev. Bd. 1981) (rejecting argument that partial black ownership entitled to more comparative credit than hispanic ownership in Miami, Florida market) (subsequent history omitted).[20] Hence, if minority audience presence is wholly irrelevant for comparative "enhancement" purposes in the licensing process, then it is *a fortiori* inapposite to the much more important statutory preferences of Section 307(b).[21]

Conclusion

8. But for Suburbanaire's belated Milwaukee bravery, this case would easily have fallen into what we termed in *Debra D. Carrigan, supra*, the "Traditional Model," *see id.*, at 727-728,[22] making its bid for the first fulltime transmission service for West Allis, Wisconsin a hands-down victor over CID's redundant Chicago proposal. However, its remarkably candid amendment for

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Comm'r Sharp (attacking purported Comm'n departure from "nexus" policy).

[20] The virulent and dehumanizing attempts of recent applicants to atomize the American population into nothing more than a clinical genetic matrix, as in *New Continental, supra*, calls to mind the prophetic caveat of Theodore Roosevelt:

> There is no room in this country for hyphenated Americanism. . . . The one absolutely certain way of bringing this nation to ruin, of preventing all possibility of its continuing to be a nation of all, would be to permit it to become a tangle of squabbling nationalities.

Speech Before the Knights of Columbus (New York, October 12, 1915). *See also* Dissenting Statement of Comm'r Dawson in *Random Selection/Lottery Systems*, 102 FCC 2d 1401, 1414 (1985) (Comm'r "unconvinced of the wisdom of preferences" or "the fairness or Constitutionality of any Government actions which are premised on racial or ethnic—or gender based—preference"). We concede, however, that our statutory and policy enhancement programs promote such eugenically contrived applicants, even to the point of frequent shams. *See generally Dorothy J. Owens*, FCC 86R-46, released July 28, 1986, at para. 11.

[21] For identical reasons, we ignore CID's unsubtle pitch for "a new AM station owned by Hispanics and programmed for the Hispanic community in Chicago." CID Reply at 2; *see also id.*, at 15-16. *Eadem est ratio, eadam est lex.*

[22] In *Carrigan* we iterated that "[t]he vast majority of our comparative cases turn out to be the 'traditional model' " insofar as the award of a Section 307(b) preference. *Id.*, at 727. That is, an unserved or conspicuously underserved community is dispositively entitled to the new broadcast facility over better-served rivals. We also noted that *Huntington* doctrine cases were the "exception." *Id.*, at 729. *See also WHW Enterprises, supra; Beaufort County, supra.* We recognize that we have recently had a rash of *Huntington* cases, *e.g., Carrigan; Hispanic Owners, supra; Arizona Number One, supra.* But this outbreak is easily explained by the fact that many Western U.S. frequencies that have lain fallow for lack of a population base so to make new, competitive stations economically cost effective are now regarded as part of the recent Sun Belt "gold rush." Hence, in Las Vegas, Albuquerque, Phoenix, Dallas-Ft. Worth, the call is: Eureka—pass the Form 301! Whether these latterday sourdoughs strike gold or strike out remains to be seen.

dual city licensing has made this a much closer case, and some of CID's contentions seem not entirely without merit. Should it develop that WAWA-AM does not continue to serve the specific needs, problems and interests of West Allis with its nonentertainment programming, Mr. Davis will be assessed a penalty for unsportsmanlike conduct a great deal more costly than 15 yards; the Commission will surely call a default on the game—and the license. *See Suburban Community Policy, supra*, 93 FCC 2d at 451.[23] As it is, the record here provides no persuasive reason to discredit Suburbanaire's intent to provide a first fulltime service, albeit hyphenated, to West Allis. While its Section 307(b) preference patently is not as strong as the conventional award, Suburbanaire's proposal to bring a first nighttime transmission service to the sizeable city of West Allis, Wisconsin is sufficiently preferred by statute over yet another Chicago outlet to win the day. And the night.

9. ACCORDINGLY, IT IS ORDERED, That the application of Suburbanaire, Inc. (File No. BP-801222AA) for a construction permit for modification of Station WAWA(AM), West Allis, Wisconsin IS GRANTED, that the application of CID Broadcasting, Inc. (File No. BP-810105AE) IS DENIED, and that the application of Stevens Broadcasting Corporation (File No. BP-801205AI) IS DISMISSED; and

10. IT IS FURTHER ORDERED, that the motion to accept further supplement and further supplement, filed April 18, 1986, by Suburbanaire, Inc. IS GRANTED and the supplement IS ACCEPTED, and that the motion to strike, filed May 7, 1986, by Suburbanaire, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

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[23] We hasten to add that, *Suburban Community Policy*, aside had WAWA-AM been previously a Milwaukee license here seeking a Section 307(b) preference by amendment to become dually licensed with West Allis, we would have likely called a foul, and sent the licensee to the showers. The Commission obviously did not intend that *Suburban Community Policy* to inspire Section 307(b) city-of-license chicanery, but to discourage it.

FCC 86D-18

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications	
STEVENS BROADCASTING CORPORATION WMRO(AM), Aurora, Illinois	MM DOCKET NO. 84-417 File No. BP-801205AI
SUBURBANAIRE, INC. WAWA(AM), West Allis-Milwaukee, Wisconsin	MM DOCKET No. 84-418 File No. BP-801222AA
CID BROADCASTING, INC. Chicago, Illinois	MM DOCKET NO. 84-421 File No. BP-810105AE
For Construction Permit for a New AM Station	

Appearances

John E. Fiorini, III and *Paul Heldenbrand* on behalf of Stevens Broadcasting Corporation; *Harry P. Warner* and *Eric S. Kravetz* on behalf of Suburbanaire, Inc.; *Virginia Carson, Stephen A. Sharp* and *Miriam C. Kircher* on behalf of CID Broadcasting, Inc.; and *John F. Garziglia* and *Arthur I. Steinberg* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: March 13, 1986; Released: March 18, 1986

Preliminary Statement

1. This proceeding was designated for hearing by *Hearing Designation Order*, MM 3947, released May 3, 1984, 49 Fed. Reg. 19732, published May 9, 1984 (HDO). It involves the mutually-

exclusive applications of Stevens Broadcasting Corporation (Stevens), Suburbanaire, Inc. (Suburbanaire) and CID Broadcasting, Inc. (CID),[1] for a construction permit for a new or modified unlimited time Class II-B standard broadcast station on Clear Channel frequency 1200 kHz at Aurora, Illinois, West Allis-Milwaukee, Wisconsin, or Chicago, Illinois, respectively. The frequency, a clear channel, was made available by order of the Federal Communications Commission (Commission), *Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC 2d 1345, 47 RR 2d 1099 (1980) now embodied as Section 73.25 of the Commission's Rules. The Commission redesignated the frequencies, formerly reserved only for use by the 25 clear channel stations, and made them available for use as a Class II-B station, provided certain nighttime coverage protections were supplied to the existing clear channels. The following issues were specified in the HDO:

> 1. If a final environment statement is issued with respect to ... CID Broadcasting, Inc. which concludes that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine:
>
> (a) whether the proposal [is] consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules; and
>
> (b) whether, in light of the evidence adduced pursuant to (a) above, the applicant [is] qualified to construct and operate as proposed.
>
> 2. To determine with respect to the application of CID Broadcasting, Inc.:
>
> (a) whether the applicant has available sufficient funds to construct and operate as proposed; and
>
> (b) whether, in light of the evidence adduced pursuant to (a), the application is financially qualified.
>
> 5. To determine with respect to the proposals of Suburbanaire, Inc., whether circumstances exist which warrant waiver of Section 73.21(a)(2)(ii)(C) of the Commission's Rules.

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[1] Mutually exclusive applications filed by Midway Broadcasting Company, Maywood-Chicago, Illinois (File No. BP-801105AC) and Publimet Broadcasting Company, Inc., Melrose Park, Illinois (File No. BP-810105AD) were voluntarily dismissed. *Memorandum Opinion and Order*, FCC 85M-851, released February 25, 1985; *Order*, FCC 84M-4826, released November 15, 1984. The mutually exlcusive application of Chicagoland Christian Radio, Inc., Frankfort, Illinois (File No. BP-810105AB) was dismissed with prejudice for failure of the applicant to diligently prosecute its application. *Memorandum Opinion and Order*, FCC 84M-5238, released December 18, 1984.

6. To determine with respect to the proposal of CID Broadcasting, Inc., whether circumstances exist which warrant waiver of Section 73.21(a)(2)(ii)(C) of the Commission's Rules.

8. To determine the areas and populations that would receive primary service from each proposal and the availability of other primary aural services to such areas and populations.

9. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient, and equitable distribution of radio service.

10. To determine, in the event it is concluded that a choice among the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

11. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

The HDO required that CID, within 30 days of the release of the order, submit an amended environmental narrative statement conforming to the requirements of Section 1.1311 of the Commission's Rules. CID submitted such a statement on June 4, 1984. The HDO further stipulated that, in the event that the CID application is granted, the construction permit shall contain the following conditions:

(a) Arthur R. Velasquez will divest himself of all interest in Monroe Communications Corporation and in the Illinois Bell Telephone Company prior to grant of program test authorization; and

(b) Joseph G. Antelo will divest himself of all interest in WGN(AM) prior to grant of program test authorization.

3. A prehearing conference in this proceeding was held on July 12, 1984;' the hearing was held on December 4, 1984; and a rebuttal hearing was held on March 29, 1985.

Findings of Fact

The Preclusion Issues

4. Section 73.21 (a)(2)(ii)(C) provides that new Class II-B stations on the U.S. clear channel frequencies operate with a nighttime power of 1.0 kW. Suburbanaire and CID have proposed to operate with a nighttime power of 2.5 kW, so that an issue has been specified as to each to determine whether significant preclusion of other new operations on that frequency would result. If there would be no significant preclusion, a waiver of Section

73.21(a)(2)(ii)(C) would be warranted; if a lack of significant preclusion cannot be demonstrated, the applicant in question must "drop back" to the prescribed 1.0 kW nighttime power limit. *Hearing Designation Order*, para. 9. The preclusion area created by the Suburbanaire and CID proposals to operate during nighttime hours with a power of 2.5 kW is that lying between the predicted 10 mV/m nighttime limit contour shown in the respective applications and the 10 mV/m limit contour which would be predicted assuming a nighttime operating power of 1.0 kW.

5. In support of its request for a waiver, Suburbanaire has submitted the "Engineering Statement" of its consulting engineer, Ralph E. Evans, III. (Suburbanaire Ex. 2). Therein, it is concluded that Suburbanaire's proposed nighttime power of 2.5 kW would not preclude additional service within any area not already precluded from receiving such service by virtue of other factors. Upon examination of the area to the north of the 0.5 mV/m percent nighttime skywave contour of co-channel Class I–A Station WOAI, San Antonio, Texas, which causes the 10 mV/m limit, Evans determined that no new application may be filed to serve the WAWA-limited area east of West Allis, even if Suburbanaire's nighttime power was limited to 1 kW. This is due to the fact that the daytime service areas of previously cutoff applications and/or the existing facilities of Stations WAWA, WOWO (Fort Wayne, Indiana), and WCHB (Inkster, Michigan), preclude the filing of any such applications (Suburbanaire Ex. 2, p. 1).

6. Similarly, Evans determined that the Suburbanaire proposal would create no additional preclusion to the area west of West Allis. This is due to the fact that the daytime facilities of Stations WAWA, WVLE (Stillwater, Minnesota), and KFNW (Fargo, North Dakota), already have some preclusive impact. In addition, using the Commission's assumption that preclusion during nighttime hours is created within an existing station's 0.5 mV/m 10 percent nighttime skywave contour, Evans determined that the authorized nighttime operation of co-channel Station KDEC, Decorah, Iowa, otherwise precludes an additional nighttime service to the area west of West Allis even if Suburbanaire's nighttime power was limited to 1 kW (Suburbanaire Ex. 2, p. 1).

7. Mr. Evans' study on behalf of Suburbanaire relied heavily on a signal on 1200 kHz from KDEC in Decorah, Iowa. However, KDEC is presently licensed on 1240 kHz. It received a construction permit to change frequencies to 1200 kHz, but that construction permit was revoked by the Mass Media Bureau for failure to

construct (CID Rebuttal Ex. 1). By *Order*, FCC 85-546, released October 15, 1985, the Commission affirmed the Mass Media Bureau action cancelling the KDEC permit.

8. In support of its request for a waiver, CID has submitted the "Engineering Report" of its consulting engineers, Moffet, Larson & Johnson (Johnson) (CID Ex. 8A). Therein, it is concluded that there is not significant preclusion to future applications for 1200 kHz by the use of 2.5 kW power, instead of 1 kW power, at night by CID. Johnson states that the normally protected nighttime contour of a Class II-B station coming within Section 73.21(a)(2)(ii)(C) of the Rules is 10 mV/m. Johnson determined that 4.47 mV/m was the lowest contribution to the RSS which would raise the night limit at a point to above 10, and concluded that a CID contribution of less than 4.47 mV/m to the night limit at a point would either not enter the RSS or the RSS would be less than 10 mV/m. Johnson calculated CID's 4.47 mV/m limiting contours for the proposed 2.5 kW power as well as for 1 kW power. Outside of these contours, the CID limit would enter an existing limit such that it would increase that limit above 10 mV/m. The area between these two contours would be the only area where an existing limit of less than 10 mV/m would be increased above 10 mV/m by the CID 2.5 kW proposal (CID Ex. 8A, p. 3, and Figure 3).

9. Johnson determined that some of this area is already precluded by the fact that an operation on 1200 kHz must protect daytime facilities on 1200 kHz and adjacent channels. For example, the proposed CID daytime 0.05 mV/m contour would preclude daytime operation of stations in cities with no local transmission service. The 0.025 mV/m contour would preclude a much larger area. Johnson calculated the 0.05 mV/m contour for authorized co-channel stations, the 0.5 mV/m for authorized stations on first adjacent channels, and the 2 mV/m contour for authorized stations on second adjacent channels. Johnson made a study of the effect of authorized facilities on the night limit in the possible remaining preclusion area. Most of the area is enclosed within a presently authorized 10 mV/m limiting contour. Of that which is not encompassed by one of the night or previously mentioned day contours, most already receives a RSS night limit of greater than 10 mV/m (CID Ex. 8A, pp. 3-4, and Figures 3, 5-A and 5-B).

10. Johnson also considered two other possibilities. Specifically, there are currently two Canadian stations planned on 1200 kHz, both requesting 10 kW, unlimited time, using directional antennas

at night. One is located in Sault Saint Marie, Ontario, and the other in Tillsonburg, Ontario. Since these two applications are considered to be mutually exclusive, the effects of each were considered separately. Assuming that the Sault Saint Marie station is constructed, Johnson concluded that there are no areas where the existing limit would be below 10 mV/m. If the Tillsonburg application is the one which is constructed, Johnson determined that there will be one small area near Battle Creek, Michigan, where the CID 2.5 kW proposal would raise the limit above 10 mV/m where it would not have with 1 kW (CID Ex. 8A, p. 4 and Figures 4, 5-A and 5-B).

11. Johnson drew a detailed map of this area (CID Ex. 8A, Figure 4). Johnson found that within that area, there are no cities of greater than 2,500 people which do not presently have a fulltime local aural transmission facility. There is one such census designated place, Springfield Place, Michigan, which in entirely within the preclusion area. However, Springfield Place is located within the Battle Creek Urbanized Area, as defined by the 1980 U.S. Census. The population given in the 1980 Census for Springfield Place is 4,463 persons, and it presently receives full-time service from the following three aural transmission facilities licensed to Battle Creek: WBCK(AM), WDFP(FM), and WKFR-FM (CID Ex. 8A, p. 4).

12. Stevens introduced its consulting engineer, E. Harold Munn for rebuttal of the preclusion studies. Mr. Munn testified that his rebuttal study picked one small community, Silver Bay, Minnesota, as an example of the asserted impact of both the CID and Suburbanaire proposals. Mr. Munn, however, admitted under cross-examination that Silver Bay would have, at worst, a radius of some 6.62 miles around the town in which to locate a transmitter (Tr. 215 and CID Surrebuttal Ex. 1).

Environmental Issue

13. A contingent environmental issue was designated in the HDO, *supra*, which also provided for a waiver of Section 1.1317 of the Commission's Rules and allowed the comparative phase of the proceeding to go forward before the environmental phase was completed. The Commission staff has completed processing of its findings on the environmental issue and a final statement has been rendered which requests that the Presiding Judge delete this issue. See Letter dated May 24, 1985 from W. Jan Gay, Assistant Chief, Audio Services Division, Mass Media Bureau, reference 8910-MR.

Financial Issue

14. Issue 2 of the HDO, *supra*, added a financial qualification issue against CID as a result of the expiration of a bank commitment letter which CID has filed with its application in 1980. On June 4, 1984, CID supplied another commitment letter from Drovers Bank of Chicago in the amount of $400,000 for use in constructing the proposed station (CID Ex. 9). At the hearing, Mr. Velasquez testified he has recently sold his company, Azteca Corn Products, to Pillsbury (CID Ex. 7). Proceeds from this sale are also anticipated to be used in construction and operation of the proposed station. The two principals of CID submitted financial statements with Form 301 which show that they both have sufficient assets to embark upon this broadcasting endeavor, and Drovers Bank notes in its updated commitment letter that it has examined both principal's most recent financial statements to find that the applicants have sufficient assets to serve as collateral for a loan (CID Ex. 9).

The Section 307(b) Issue

Aurora, Illinois

15. Stevens proposes to modify the facilities of WMRO so as to provide improved service to its community of license, Aurora, Illinois, and the area surrounding that community. Aurora had a 1980 U.S. Census population of 81,293 persons (Suburbanaire Ex. 8, p. 11). There presently are three full-time radio stations (*viz.* WMRO, WAVR-FM and WKKD-FM) and one daytime-only station (*vis.* WKKD) licensed to the community (Suburbanaire Ex. 5A, p. 2; CID Ex. 8 pp. 3, 6). All areas to which Stevens would provide a new reception service presently receive in excess of five aural services both day and night (Suburbanaire Ex. 5A, p. 3; CID Ex. 8, p. 2).

West Allis, Milwaukee, Wisconsin

16. Suburbanaire proposes to modify the facilities of WAWA so as to provide full-time service to the West Allis and Milwaukee communities (Suburbanaire Ex. 5A). Suburbanaire, through its present AM facilities, reaches 70% of the city of Milwaukee with a total population of 636,212 persons. If its proposal is granted, it would reach the entire city of Milwaukee and other suburban communities such as Glendale, Mequon, Bayside, Greendale, Franklin, Greenfield, River Hiills, Fox Point, and Brown Deer

during the day. (*Id.*) Its proposed 2.5 kW of power at night would cover the majority of the city of Milwaukee with the exception of the county airport and a small area north of the airport of 5.12 miles and a 1970 Census count of 5.2% of the city's population (Suburbanaire Ex. 6-5). In its requested nighttime coverage waiver to operate at 2.5 kW, Suburbanaire states that it would not reach 11.9% of the city area at night and would not reach 1,206 persons (1.7% of the 1970 Census population of 71,723). In testimony at the hearing, Mr. Willie Davis, principal of Suburbanaire, Inc., further demonstrated that WAWA does not direct its programming efforts to the citizens of West Allis, where there are only 43 Blacks, but rather to the Black population in the Milwaukee SMSA (Tr. 65). Willie Davis also testified that WAWA is only "occasionally" profitable on a month-to-month basis, and relies on its co-owned FM station, WKUM(FM), Milwaukee, to a great degree for its continued viability (Tr. 83-85).[2] Suburbanaire's March 29, 1985 Petition for Leave to File Contingent Amendment shows that, operating at the prescribed nighttime power limit of 1 kW, the proposed WAWA facility would provide principal city coverage to 94 percent of Milwaukee. Sixteen full-time radio stations and one daytime-only radio station are licensed to the city of Milwaukee (Suburbanaire Ex. 5A, pp. 1-2). One daytime-only station serves West Allis. The overall areas and populations which would receive a new daytime and/or nighttime reception service from WAWA presently receive in excess of five aural services (Suburbaniare Ex. 5A, p. 3). In addition to serving as a West Allis outlet, WAWA directs its programming to the Black minority residing within its reception area (Suburbanaire Ex. 1, pp. 1-2; Tr. 65-66, 80).

17. The Bureau of the Census shows that the Milwaukee SMSA which includes Milwaukee and West Allis has 1,397,143 inhabitants (Suburbaniare Ex. 8-25). Of those 150,677 are Black (10.7%). In the city of Milwaukee, the number of Blacks is listed as 146,940 out of a total population of 636,212 (Suburbanaire Ex. 8-27). In West Allis, the number of Blacks is listed as 43, or .06% of that suburban city's population of 63,982 (Suburbanaire Ex. 8-29). WAWA presently provides a daytime reception service of 70% of Milwaukee; upon grant of its application (at 2.5 kW), it would for the first time provide a daytime reception service to all of Milwaukee's Black population, the Black population of other

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[2] WAWA's sister station, WLUM(FM), is licensed to Milwaukee, Wisconsin (Suburbanaire Ex. 1, p. 1). The WAWA and WLUM studios are co-located in Elm Grove, Wisconsin (Tr. 85).

communities surrounding Milwaukee, and the Black population of Racine, Wisconsin. It would also for the first time provide a nighttime reception service to the Black minority in and around Milwaukee (Suburbanarie Ex. 5A). However, with its contingent amendment submitted in the record on March 29, 1985 Suburbanaire failed to submit population and coverage data for its station at 1 kW nighttime power.

Chicago, Illinois

18. CID proposes to serve the city of Chicago and the surrounding metropolitan area with a new transmitter service (CID Ex. 8, Figure 1-C). This would include all of Cook and Dupage Counties and substantial portions of Will, Kendall, Grundy, Kane, Lake, and Kankakee Counties (Suburbaniare Ex. 5A). The daytime population CID proposes to cover is 7,222,080 persons over a 9,594 square mile area (CID Ex. 8). CID seeks to provide service particularly to the Hispanic community (Suburbanaire Ex. 7-5). There is no radio station serving the Chicago area which is owned and operated by Hispanics (Suburbaniare Ex. 7-15). Both of CID's principals are Hispanic and both are fluent in Spanish. Hispanics are the second largest ethnic group in Chicago (Suburbanaire Ex. 7-6). The population of the city of Chicago includes 422,063 Hispanic persons, or 14% of the population. (*Id.*)

19. Chicago presently is served by 25 full-time and one daytime-only aural transmission services licensed to the city (Suburbanaire Exs. A, p. 2, and 8, p. 12; CID Ex. 8, pp. 6-7). The overall areas and populations which would receive a new daytime and/or nighttime reception service from CID's proposed station presently receive in excess of five aural services (Suburbanaire Ex. 5A, p. 3; CID Ex. 8, p. 2).

Tabulation of Populations and Areas[3]

Applicant	*Contour*	*Population*	*Area Sq. Mi.*
CID	0.5 mV/m daytime	7,222,080	9,594
(proposed)	11.5 mV/M night limit	2,292,816	193
Stevens	0.5 mV/m daytime	6,232,862	13,010
(proposed)	12.3 mV/M night limit	170,026	162
Stevens	0.5 mV/M daytime	1,256,020	5,669
(actual)	existing night limit	53,424	85

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[3] CID's proposed finding paragraph 13, pp. 11-12. Population is taken from the 1980 Census except for the Suburbanaire figures, which are drawn from the 1970 Census in its 301 application form. The Suburbanaire data was never entered into the record.

Applicant	*Contour*	*Population*	*Area Sq. Mi.*
Stevens (gain)	0.5 mV/m daytime 12.3 mV/m night limit	4,976,842 116,602	7,341 77
Suburbanaire (proposed)	0.5 mV/m daytime 10 mV/m night limit	1,971,041 981,021	4,960 346.3
Suburbanaire (actual)	0.5 mV/m daytime	1,196,801	665.6
Suburbanaire (gain)	0.5 mV/m daytime 10 mV/m night limit	774,240 981,021	4,294.4 346.3

Contingent Comparative Analysis

20. *Stevens Broadcasting Corporation.* Stevens, licensee of WMRO(AM), Aurora, Illinois, is an Illinois corporation whose two principals are Dale W. Stevens and Harold L. Brokaw. Mr. Stevens, a white male, is President and Director of Stevens and holds 63 percent of the corporation's issued and outstanding stock (Stevens Ex. 1, p. 1).[4] He has served as full-time Chief Executive Officer of WMRO since Stevens acquired that station in 1969, and also of WAUR(FM), WMRO's sister station in Aurora, since 1972.[5] Mr. Stevens will continue in that capacity on a full-time basis if the WMRO application for 1200 kHz is granted. Prior to 1969, Mr. Stevens worked in a variety of other broadcast and broadcast-related positions for approximately twelve years.

21. Mr. Stevens has lived in Elmhurst, Illinois — a community located approximately 15 miles northeast of Aurora, and within the proposed daytime primary service area of WMRO — since 1948 (with the exception of three years spent in the Army during the Korean War, and a two-year residence in Oak Brook, Illinois).[6] His residence for the past 17 years has been at 343 Prospect, Elmhurst, Illinois. (*Id.* at 1-2)

22. Mr. Stevens has been active in local civic and religious affairs since 1949. He has served as a Director of the DuPage County Council Boy Scouts since 1976.[7] From 1960 through 1979 he was a member of the Elmhurst Parent Teachers Association.

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[4] The authorized capital of Stevens consists of 100 shares of common stock having one vote per share. A total of 100 shares are issued and outstanding. (*Id.*)

[5] WAUR(FM) was acquired by Stevens Communications Corporation in 1972 (Stevens Ex. 2, p. 1). The ownership of Stevens Communications Corporation is set forth in Stevens Ex. 1, at p. 2).

[6] Oak Brook (located south of Elmhurst) is also within the WMRO proposed daytime primary service area. (*Id.* at p. 2).

[7] Aurora city is located in both DuPage and Kane Counties. (*Id.* at Attachment A).

In 1984, he became a member of the Valparaiso University Presidents Club. He has been a member of the First Congregational United Church of Christ, located in Elmhurst, Illinois since 1949. He served as a Trustee of the church for three 3-year terms between 1965 and 1982, and was Chairman of the Board of Trustees during 1981. He has also served in various other official church capacities. (*Id.* at 2).

23. Mr. Stevens' only mass media interests are his 63 percent equity interest in Stevens Broadcasting Corporation, licensee of WMRO, and his 31.84 percent equity interest in Stevens Communications Corporation, licensee of WAUR(FM) (Stevens Ex. 1 pp. 1-2).[8]

24. Mr. Brokaw, a white male and 37 percent owner of Stevens, serves as the corporation's Director, Vice-President, Secretary and Treasurer (Stevens Ex. 1, p. 1). He has been employed as full-time General Manager of WMRO and WAUR(FM) since those stations were acquired in 1969 and 1972, respectively, and will continue to serve in that capacity on a full-time basis if Stevens' application is granted (Stevens Ex. 3, p. 1).

25. Before becoming employed at WMRO and WAUR, Mr. Brokaw worked for a total of 21 years in various engineering and engineering management positions at three AM stations licensed to Westinghouse Broadcasting Corporation.

26. Mr. Brokaw has lived in Aurora, Illinois, the proposed city of license, since 1969. His current residence is at 2370 Wyckwood Drive, Aurora, Illinois. (*Id*) Prior to moving to Aurora, Mr. Brokaw lived in Deerfield, Illinois for approximately three and one-half years during the period 1966 to 1969. Deerfield (located north of Chicago) is within the proposed daytime primary service contour of WMRO. (*Id.* at 2)

27. Mr. Brokaw has been extremely active in civic and community affairs in Aurora and its surrounding environs since 1969. He has been a member of the Greater Aurora Chamber of Commerce since 1969. He currently serves as Director, Chairman-Elect and Treasurer of the Chamber, and as Trustee for the Chamber Foundation. He has also been a director, officer or advisor for numerous other civic organizations in the Aurora area. Most of Mr. Brokaw's current civic activities take place during early morning, lunchtime and evening hours, and therefore do not

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[8] Stevens Broadcasting Corporation, in which Mr. Stevens holds a 63 percent interest, also holds a 30.61 percent interest in Stevens Communication Corporation. (*Id.* at 2)

interfere in any way with his full-time commitment to the station. (*Id.* at 1–2)

28. WMRO is presently equipped with auxiliary power generating at its combined studio-transmitter location in Aurora. If Stevens' application is granted, Stevens will install a second auxiliary power generator at the new WMRO transmitter site to ensure continuous operation of the station in the event of interruption of electrical power (Stevens Ex. 4).

29. *Suburbanaire, Inc.* Suburbanaire is a Wisconsin corporation which is wholly owned by All Pro Broadcasting, Inc., a California corporation. The officers and directors of Suburbanaire, Inc. are:

Name	*Office*
Willie D. Davis	President, Treasurer, Director
Ann M. Davis	Vice-President, Secretary, Director
Joseph P. Nelson, Jr.	Director
Richard T. McIntosh	Vice-President

The officers, directors and shareholders of All Pro Broadcasting, Inc. are:

Name	*Office*	*Ownership Interest*
Willie D. Davis	President, Director	66 2/3%
Ann M. Davis	Vice-President, Secretary-Treasurer, Dir.	—
Cliff Gill	Director	—
James Blakely	Vice-President	—
L. David Moorhead	Vice-President	—
Northwestern Mutual Life Insurance Co.	—	33 1/3%

Suburbanaire, Inc. is licensee of Station WAWA, West Allis, Wisconsin, and WLUM(FM), Milwaukee, Wisconsin. All Pro Broadcasting, Inc. is licensee of Station KACE(FM), Inglewood, California, and owns 100% of the stock of All Pro Broadcasters of Washington, Inc., licensee of Station KQIN, Burien, Washington, and 100% of the stock of Starr KYOK, Inc., licensee of Station KYOK, Houston, Texas. Mr. Davis also owns 35% of All Pro Broadcasters of Colorado, permittee to construct a new AM station in Commerce City, Colorado (Suburbanaire Ex. 1, pp. 1–2; amendment filed January 17, 1985).

30. Willie Davis is President, Treasurer and a Director all All Pro Broadcasters of Washington, Inc., and is President and a Director of Starr, KYOK, Inc. Cliff Gill is a Director and 24% shareholder of El Camino Broadcasting Corporation, which was

licensee of Station KWVE(FM), San Clemente, California, as of the "B" cut-off date herein, and has a 30% interest in All Pro Broadcasters of Colorado (Suburbanaire Ex. 1, p. 2; amendment filed January 17, 1985).

32. Willie Davis currently participates in the management of Station WAWA for less than 20 hours per week, and proposes to maintain that level of management involvement. Northwestern Mutual Life Insurance Co. is not involved in the management of Station WAWA (Suburbanaire Ex. 1, p. 2).

32. *CID Broadcasting, Inc.* CID is owned as follows:

Name and Residence	*%Ownership*
Joseph G. Antelo 3240 North Lake Shore Drive Chicago, Illinois	55%
Arthur R. Velasquez 10242 South 87th Avneue Palos Hills, Illinois	45%

33. Joseph G. Antelo, an Hispanic male, is President and 55% owner of CID (CID Ex. 1). He has lived in Chicago, Illinois since 1975 and resides within CID's proposed 2 mV/m daytime coverage contours as well as CID's proposed 11.5 mV/m nighttime coverage contours (CID Exs. 4 and 8, Figure 2). He is the proposed General Manager for CID and will be employed in this capacity for a minimum of 40 hours per week (CID Ex. 4). He has no ownership interest in any other medium of mass communications. At present, he is employed by Tribune Entertainment of Chicago as Executive Vice President. He will resign this position should CID be granted the construction permit so that he may devote full attention to his duties as General Manager. (*Id.*) Mr. Antelo has a varied broadcasting background of 24 years (CID Ex. 4).

34. Mr. Antelo maintains memberships in several civic organizations. (*Id.*) He serves on the Membership Committee of the Chicago Advertising Club and is an active member of the Chicago Boys Club and the Chicago Athletic Club. All three organizations are involved in performing charitable work in Chicago (Tr. 177).

35. Mr. Antelo holds a B.A. degree in Business from City College in New York and is two credits away from completing a Master's degree in Public Administration (CID Ex. 4).

36. Arthur R. Velasquez, an Hispanic male, is Vice-President and 45% owner of CID (CID Ex. 1). He is a native of Chicago, having been a resident since his birth in 1938 (CID Ex. 7). His residence for the past five years is in Palos Hills, a suburb of the

city (Tr. 154) and within CID's proposed 2 mV/m daytime coverage contours (CID Ex. 7).

37. Mr. Velasquez, is the proposed Vice-President of Business and Finance and will be employed in this capacity for a minimum of 40 hours per week (CID Ex. 6). He will be responsible for the financial affairs of the station, including short and long-term business decisions, supervision of the sales staff, and day-to-day business management of the station. Mr. Velasquez will assist Mr. Antelo in managing the overall operation of the station. (*Id.*)

38. The only ownership interest in any medium of mass communications which Mr. Velasquez holds is a 10% interest in Monroe Communications, which was recently awarded the construction permit for Channel 44 in Chicago (CID Ex. 5). Mr. Velasquez made a timely pledge to divest this interest should CID be granted the construction permit in this proceeding. (*Id.*)

39. Mr. Velasquez is currently employed by Pillsbury Corporation, which purchased Azteca Corn Products Corporation, a company which Mr. Velasquez founded in 1970 (CID Ex. 7). Mr. Velasquez has a written agreement with Pillsbury which allows him to leave Azteca when it becomes necessary for him to devote his full energies to his job duties for CID in the event of a grant of the construction permit (Tr. 156 and 161).

40. Mr. Velasquez has been active in civic, business and service groups both locally and nationally (CID Ex. 7). He has served on numerous Chicago public and civic commissions, including seven years as a member of the Chicago Planning Commission (1973–1980) and six years as a Trustee of the University of Illinois (1974–1980). (*Id.*)

41. Mr. Velasquez is currently a Director of the Illinois Bell Telephone Company, Chicago Metro Junior Achievement, Midtown Center, and General Woods Chicago Boys Club. In addition, he is a member of Chicago United, the Economic Club of Chicago, and the Private Industry Council (PIC). (*Id.*)

42. In the past, he has served as a Director of the Hispanic Housing Development Corporation, Dearborn Park Development Corporation, the Mexican-American Legal Defense Fund (MALDEF), and the Sears Roebuck Foundation. He has also served as a Director of Washington National Bank, the Chicago Community Ventures (a MESBIC), and the University Civil Service Merit Board. Currently a director of the Azteca Lions Club, he is a former president and has been a member for 13 years. Mr. Velasquez is also a former president of the Holy Name Society of Chicago's Queen of the Universe Church. (*Id.*)

Conclusions of Law

The Preclusion Issues

43. Issues 5 and 6 were specified to determine with respect to Suburbanaire and CID, respectively, whether waivers of Section 73.21(a)(2)(ii)(C) of the Commission's Rules are warranted. That section limits new Class II-B stations on clear channel frequencies to 1 kW power at night. Both Suburbanaire and CID propose 2.5 kW nighttime power. In order to justify a waiver of Section 73.21(a)(2)(ii)(C) of the Rules, the applicants were required to establish that the 2.5 kW nighttime power proposed is necessary to provide principal city coverage, and that grant of a waiver would not impede the Commission's allocation objectives (HDO, at para. 9).

44. CID's preclusion study by Wallace E. Johnson, a consulting telecommunications engineer, tracked the existing stations on 1200 kHz and particularly the nighttime signal from WOAI, the clear channel station in San Antonio. The Johnson study also took note of two planned Canadian stations, at Tillotsonburg and Sault Saint Marie as notified by the Canadian government (CID Ex. 8-B). Under the treaty between the United States and Canada, a notification by the Canadian government of an intent to authorize a station carries the same impact as a construction permit granted to an applicant in the United States, insofar as engineering studies of this type are concerned (Tr. 50). Taking all the present stations and the Canadian notification together, Mr. Johnson found no significant additional preclusion caused by operation at 2.5 KW at night by CID (CID Ex. 8-B and CID Rebuttal Ex. 1). The result of the Johnson study was confirmed categorically by Ralph Evans, the consulting engineer for Suburbanaire (Tr. 34).

45. In rebuttal consulting engineer for Stevens, Mr. E. Harold Munn chose on small community, Silver Bay, Minnesota, as an example of the asserted impact of the CID and Suburbanaire proposals on actual locales (Stevens Rebuttal Ex. 1). Mr. Munn purposed to show that the operation at 2.5 kW would significantly handicap an AM station on 1200 kHz in Silver Bay and require location of its transmitter in a specified area of the community. Taking the Munn study at face value, an applicant proposing a new station on 1200 kHz at Silver Bay would have, at worst, a radius of some 6.62 miles around the town in which to locate its transmitter (CID Surrebuttal Ex. 1). Since the town itself is only 8 square miles in area, and roughly 2 miles across in

the built-up portion, (Tr. 215), the 6-mile radius available for a transmitter site should supply at least one suitable tower location (*Id.*) In light of the foregoing it appears that the waiver of Section 73.21(a)(2)(ii)(C) should be and is granted to CID.

46. Crucial to Suburbanaire's request for the waiver of Section 73.21(a)(2)(ii)(C) was the construction permit of KDEC for 1200 kHz in Decorah, Iowa. The operation of KDEC on 1200 kHz was important to Suburbanaire because a KDEC signal on that frequency would negate much of the preclusion of new stations otherwise caused by operation of Suburbanaire's WAWA on 1200 kHz. However, by *Order*, FCC 85-546, released October 15, 1985, the Commission affirmed the Mass Media Bureau's action cancelling the KDEC permit. It was in anticipation of this latter ruling that Suburbanaire filed a contingent amendment to its application providing for the reduction of Suburbanaire's proposed nighttime power to 1.0 kW. In light of the foregoing, Suburbanaire's Petition for Leave to File Contingent Amendment, filed March 29, 1985 is granted.

Environmental Issue

47. CID presented evidence to supplement the Environmental Statement originally filed with its application as CID Exhibit 10, which was not challenged by any party or the Mass Media Bureau's environmental staff. The Commission staff has returned a favorable environmental impact statement. Therefore, the issue against CID is resolved in CID's favor.

Financial Issue

48. The financial issue was added against CID because its bank commitment had expired. CID presented sufficient evidence of its financial qualifications at the hearing in the form of a bank letter from Drovers Bank in Chicago, dated May 16, 1984, which stated that review of the current financial statements of the CID principals provided the bank with adequate assurance of their assets to enable the bank to make a commitment for a loan of up to $400,000 (CID Ex. 10). The terms of the updated bank commitment are deemed to be the same as the original commitment. Therefore, the financial issue is resolved in CID's favor.

Section 307(b) Issue

49. In light of Section 307(b) of the Communications Act of 1934, as amended, the Commission must determine which of the

proposals would best provide a fair, efficient and equitable distribution of radio service. An AM station is required to "provide 2 types of services — a reception service for its entire proposed service area and a transmission service (i.e. outlet for local expression) for its proposed community of station location". *Kent-Ravens Broadcasting Co.*, 44 FCC 2603, 22 RR 605 (1961). A 307(b) comparison involves the balancing of the proposals' reception aspects — "the relative populations and extent of the areas proposed to be served and the number of reception services presently available to each of the proposed service areas and portions thereof" as well as "[t]he relative needs for a transmission service [which] are weighed primarily in the light of the number of . . . broadcast facilities in each of the communities and the populations of these communities." (*Id.*)

50. All of the applicants herein stipulated at the hearing that each of the areas proposed to be served by the respective applicants receives at least five aural services and that no applicant is entitled to a preference under the reception aspect of Section 307(b) of the Act.[9]

51. Stevens proposes to modify the facilities of WMRO so as to provide service to Aurora, Illinois, and the area surrounding that community. Aurora has four local transmission services, including WMRO. CID proposed to serve Chicago and surrounding communities. Twenty-seven radio stations are licensed to Chicago, of which twenty-six operate on a full-time basis. Suburbanaire proposes to service the West Allis, Wisconsin–Milwaukee, Wisconsin area. Milwaukee has licensed to it seventeen radio stations of which sixteen are full-time. West Allis has one daytime-only radio station. It appears that each of the communities herein have adequate transmission facilities to service their respective needs. Suburbanaire argues that is proposal would bring a first nighttime transmission service to West Allis. However the record shows that Suburbanaire's true intent is to provide Milwaukee with an additional broadcast facility ostensibly to service the Black community therein. Suburbanaire's WAWA studio is not located in its community of license, West Allis, and there is no proposal to move to a West Allis location. Furthermore, Suburbanaire alleges that the WAWA operation is not profitable.

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[9] Suburbanaire maintains that under the rationale of *Clear Channel Broadcasting*, 78 FCC 2d at 1354–56, 47 RR 2d at 1104–06, it is entitled to a preference under Section 307(b) because its minority ownership will ensure that the reception needs of the Black population in the Milwaukee area will be met. However no authority is cited for adopting such a novel construction of the Commission's statement in the *Clear Channel Report and Order*.

Consequently, none of the applications is entitled to a Section 307(b) preference.

Contingent Comparative Issue

Diversification

52. Stevens Broadcasting Corporation has no other media interests nor does Suburbanaire.

53. The principals of Stevens own WMRO-AM and WAUR-FM at Aurora, Illinois. The principals of Suburbanaire hold controlling interests in two stations in the proposed community of license and in three other radio stations throughout the county. Neither CID nor either of its two principals have any chargeable media interests.

Integration of Ownership into Management

54. *Stevens*. Stevens' principals have proposed full-time commitments divided between the two radio stations currently owned by those principals. Mr. Stevens proposes 40 hours per week divided between the two stations and Mr. Brokaw proposes 60 hours per week divided between the two stations. Mr. Stevens proposes to continue as CEO and Mr. Brokaw as General Manager.

55. Under the rationale of *Brownfield Broadcasting Corporation*, 53 RR 2d 1175 (Rev. Bd. 1983) Stevens is entitled to 100% full-time integration credit. This integration is enhanced by 100% past and future local residence, 100% civic participation and 100% past broadcast experience. Stevens also is credited with its proposal to use auxiliary power.

56. *Suburbanaire*. Suburbanaire's owner, Willie D. Davis proposes to spend less than 20 hours per week in the management of WAWA. He made no commitment to be physically present at the station in order to fulfill any of these proposed management responsibilities. Suburbanaire is 66 2/3% owned by minority group members.

57. *CID*. Both of the principals of CID have made commitments to spend a minimum of 40 hours per week integrated into the senior management positions of General Manager and Vice-President for Business and Finance at the proposed station. This 100% full-time integration is credited with 100% past and future local residence, 100% civic participation, 100% minority ownership and 50% broadcast experience.

Final Evaluation

58. *Diversification*. Under the *Policy Statement*, CID is entitled to a substantial preference over Stevens under the diversification criterion. The principals of Stevens hold the majority of stock in two radio stations in the proposed community of license which is the factor of primary importance under the *Policy Statement*. CID also is entitled to a substantial preference over Suburbanaire. Within the proposed community of license, Milwaukee-West Allis, Mr. and Mrs. Davis jointly own 66 2/3% of WAWA-AM and WLUM-FM. Through their ownership interests in All Pro Broadcasting, Inc. the Davises can be attributed with media interests in other parts of the country as well: two AM stations (Houston, Texas and Burien, Washington) and one FM station (Inglewood, California). Their interests in these radio stations are also controlling.

59. *Integration*. In a comparison of the applicants on a quantitative basis, Suburbanaire drops out. Suburbanaire's 66 2/3% owner Mr. Davis is integrated on a less than 20 hour a week basis. No integration credit can be allowed for a less than 20 hour a week commitment. In *New Continential Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (Rev. Bd. 1981), the Review Board held that a 12.5% quantitative difference constitutes a clear preference which cannot be overcome by qualitative enhancement. As between Stevens and CID, CID is stronger on a qualitative basis because its additional 100% minority ownership is stronger than Stevens' additional 50% past broadcast experience. Furthermore CID has a substantial diversification preference over Stevens which outweighs Stevens' slight preference for auxiliary power. In sum CID is the winner.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of CID Broadcasting, Inc. (File No. BP-810105AE) for a construction permit to build and operate a new standard broadcast station at Chicago, Illinois, IS GRANTED and the applications of Stevens Broadcasting Corporation (File No. BP-801205AI) and Suburbanaire, Inc. (File No. BP-801222AA) ARE DENIED.[10] The grant of CID is subject to the following conditions:

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[10] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.27(d).

(a) Arthur R. Velasquez will divest himself of all interest in Monroe Communications Corporation and in the Illinois Bell Telephone Company prior to grant of program test authorizations; and

(b) Joseph G. Antelo will divest himself of all interest in WGN(AM) prior to grant of program test authorization.

FEDERAL COMMUNICATIONS COMMISSION
JOHN M. FRYSIAK, *Administrative Law Judge*

Application, Defective
Television, Low Power

The Commission will not grant an exemption from the low power television "complete and sufficient" application acceptance standard on the basis of the minority status of the applicant.
—*Tampa Broadcasting Corp.*

FCC 86-311

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Application of	
TAMPA BROADCASTING CORPORATION	File No. BPTVL-810330JV
For A Construction Permit for a New Low Power Television Station on Channel 5, Tampa, Florida	

MEMORANDUM OPINION AND ORDER

Adopted: July 1, 1986; Released: July 8, 1986

BY THE COMMMISSION: COMMISSIONER DENNIS NOT PARTICIPATING;

1. The Commission has under consideration an application for review, filed January 16, 1986, by Tampa Broadcasting Corporation ("Tampa") of an action by the Mass Media Bureau denying Tampa's petition for reconsideration and returning its above-captioned application as unacceptable for filing.

2. By way of background, Tampa, a 100% Hispanic-owned entity, tendered an application on March 30, 1981, for a new low power television station to operate on Channel 5 in Tampa, Florida. The Mass Media Bureau returned the application on January 4, 1984, because preliminary studies indicated that Tampa's proposed facility would cause objectionable interference to full-service television station WUFT-TV, Channel 5, Gainesville, Florida, in violation of Section 74.705 of the

Commission's Rules. The Bureau's evaluation of Tampa's application had included consideration of a minor amendment specifying minus frequency offset operation, which was filed in 1982.[1]

3. Tampa made a number of unsuccessful attempts to amend its application from minus offset to plus offset. Tampa contended that its minus offset amendment had been an obvious error that the Bureau should have detected, since WUFT-TV operates with a minus carrier frequency offset. In denying Tampa's repeated requests to amend its application, the Bureau cited the complete and sufficient application acceptance standard embodied in Section 73.3564(a) of the Commission's Rules, which precludes the acceptance of post-return corrective amendments. The Bureau also noted that, even if Tampa's plus offset amendment was acceptable, it would fail to eliminate the predicted interference to WUFT-TV.

4. On review, Tampa now raises the argument that its minority status should outweigh the Commission's policy of rejecting applications that are not complete and sufficient, in order to encourage opportunities for minorities in broadcasting. Upon review of Tampa's pleading, however, we find that the Bureau's return of Tampa's application was consistent with the Commission's Rules and procedures, and we affirm the Bureau's action. *See Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985). *See also Charlotte TV Company*, 101 FCC 2d 607 (1985); *MDS of Monroe, Inc.* (Channel 25, Cincinnati, Ohio), 59 RR 2d 475 (1985).

5. Moreover, we must reject Tampa's insistence that the Commission carve out a special exemption from our processing standards for minority applicants. All applicants, including minority-controlled applicants, are expected to abide by the Commission's procedural rules. *See WSOO, Inc.*, 26 FCC 2d 152 (1970), *recon. denied*, 28 FCC 2d 768 (1971). Both Congress and the Commission have already determined that the minority preferences awarded in low power television lotteries substantially promote minority ownership of low power television stations. *See* Section 309(i)(3)(A) and (D) of the Communications Act of 1934, as amended; Section 1.1622 of the Commission's Rules; *Lottery*

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[1] Frequency offset operation permits a less restrictive desired-to-undesired interference ratio between co-channel stations, thus allowing a greater number of stations to operate on the same channel. An application can propose operation with a plus, minus, or zero frequency offset designation, or operation without a frequency offset designation. In order to evaluate co-channel proposals on an offset basis under Section 74.705(d)(l)(i), the existing station must employ a different frequency offset than that specified by the low power television applicant. *See MDS of Monroe, Inc.*, 59 RR 2d 475 (1985).

Report and Order, 93 FCC 2d 952 (1983). Tampa's proposal, in any event, would have been more appropriately raised during the notice and comment period preceding the *Lottery Report and Order, supra*, which has long since expired.

6. Tampa disputes the Bureau's finding that, even if we were accept Tampa's plus offset amendment at this time, its application would remain defective. Tampa references its analysis in a further engineering statement, purporting to show that its operation with a plus offset would not result in predicted interference to station WUFT-TV. The Bureau had concluded that such operation would result in prohibitive signal contour overlap with WUFT-TV, thereby violating Section 74.705 of the Commission's Rules. Further study traces these differing conclusions to Tampa's incorrect specification of the orientation of its proposed directional antenna, a Bogner model B6VK, which is designed to have three main symmetrical lobes of radiation in the horizontal plane. Both Tampa's further engineering statement and its original application included the manufacturer's standard polar plot of this antenna, showing main horizontal lobes at bearings of 060, 180 and 300 degrees (clockwise with respect to zero degrees at True North). Further, Tampa specified an antenna orientation of "N-0°-E" in response to Question 5, Page 1, Section V of FCC Form 346. Using these representations, Tampa referenced a relative field strength of 0.64 at an azimuth of zero degrees on the polar plot and, from this data, concluded that prohibited contour overlap would not occur.

7. The Bureau's interference predictions incorporated fully Tampa's representation of its directional antenna, except that the Bureau analysis correctly applied a relative field strength of 1.00 at the antenna orientation of zero degrees. Footnote 2 to Question 5 of the application form explicitly calls for entry of the *main radiation lobe* in degrees with respect to True North in a 360 degree horizontal azimuth, numbered clockwise with True North as the zero degree azimuth. By definition, the relative field strength of a main lobe is 1.00. Tampa erred in specifying in Question 5 the azimuth of the line of symmetry of the horizontal radiation pattern, rather than the azimuth of a main lobe. Using Tampa's incorrect specification, which appeared correct on routine inspection, the Bureau predicted interference. Tampa's incorrect representation of the orientation of the main lobe of its antenna also rendered the application defective under the low power television "complete and sufficient" acceptance standard.

8. Accordingly, IT IS ORDERED, That pursuant to Section 1.115 of the Commission's Rules, the application for review filed by Tampa Broadcasting Corporation, IS HEREBY DENIED.

9. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by Certified Mail — Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Declaratory Ruling
Emergency Communications

Declaratory Ruling adopted conditionally granting the Secretary of Defense's petition regarding the Emergency Preparedness Telecommunications Procedures Manual. The Commission in its decision, believes that the procedures discussed appear reasonable and that carrier actions in response to requests made in accordance with the Procedures Manual are prima facie lawful.

—*Telecommunications Procedures*

FCC 86-254

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Petition for Declaratory Ruling Regarding National Security Emergency Preparedness Telecommunications Procedures Manual	File No. CCB-DFD-85-36

DECLARATORY RULING

Adopted May 16, 1986; Released May 20, 1986

BY THE COMMISSION:

I. Introduction

1. Before the Commission is a petition for declaratory ruling filed by the Secretary of Defense acting in his capacity as the Executive Agent for the National Communications System (NCS)[1] seeking to remove uncertainty as to whether telecommunications service vendors (vendors) may lawfully act in accordance with the

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[1] The National Communications System is an organization established by Executive Order 12472 to assist the Executive Branch in the discharge of NSEP telecommunications requirements. The organization consists of an administrative structure and telecommunications assets of government entities designated for participation by the President. *See* Executive Order 12472, "Assignment of National Security Emergency Preparedness Telecommunications Functions," April 3, 1984.

procedures set forth in the National Security and Emergency Preparedness Telecommunications Procedures Manual (Procedures Manual or Manual). The petitioner asks the Commission to issue a declaratory ruling stating that vendors following the guidelines set forth in the Procedures Manual or, more precisely, vendors providing NSEP telecommunication services in response to requests made in accordance with the Procedures Manual, "will not be (1) engaged in unjust or unreasonable discrimination, (2) providing any undue or unreasonable preference or advantage, or (3) otherwise violating the FCC rules and policies." A number of parties have filed comments generally in support of the petition.[2] To the extent indicated herein and subject to the conditions discussed below, we grant the petition.

II. Background and Description of the Procedures Manual

2. The Procedures Manual provides guidelines to be followed by entities ordering and carriers providing NSEP telecommunications on a priority basis in circumstances not governed by the Restoration Priority Rules (RP) in Part 64 of the Commission's Rules, 47 C.F.R. § 64.401 and App. A. The document contains procedures applicable to provisioning[3] and restoration of NSEP telecommunications and defines roles and responsibilities regarding those commercial telecommunications services that may be designated NSEP telecommunications. The Procedures Manual defines NSEP telecommunications eligible for priority treatment by carriers, and enumerates a series of actions and proscriptions to be observed by government and industry entities satisfying NSEP service requirements.

3. *Definition of NSEP Telecommunications.* The document defines NSEP telecommunications as:

> (t)elecommunication services . . . used to maintain a state of readiness or to respond to and manage any event or crisis (local, national or international), which causes or could cause injury or harm to the population, damage to or loss of property, or degrades or threatens the national security emergency preparedness posture of the United States. (Manual at 6).

In a separate section entitled "Procedures" (Section VIII), under categories entitled "Emergency" and "Essential", the Manual provides more specific guidelines and criteria for determining which commercial services and circuits are eligible for NSEP designation. Emergency NSEP telecommunications service requirements are defined as those which are "so critical as to be required at the earliest possible time, without regard to the associated costs of obtaining service." (Manual at 13). These include services directly supporting Federal government activity responding to a presidentially declared disaster or emergency (as defined in the Disaster Relief Act, 42 U.S.C. § 5122) or directly resulting from a state of crisis declared by the National Command Authorities; efforts to protect endangered U.S. personnel or property; or enemy action, civil disturbance, natural disaster, or any other unpredictable occurrences that have damaged facilities whose uninterrupted operation is essential to national security emergency preparedness or the management of other ongoing crises. In addition, Emergency services include those services that have been certified as so critical to protection of life and property or to the national security that they must be processed immediately. (Manual at 13-14).[4]

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[2] American Telephone and Telegraph Co. (AT&T), Bell Communications Research, Inc. (Bellcore), BellSouth, GTE Corporation (GTE), and MCI Telecommunications Corporations (MCI) submitted comments in this proceeding. Reply comments were submitted by the Federal Executive Agencies (FEA) and GTE.

[3] Although "provisioning is not defined in the Procedures Manual it is usually used and we understand it to mean the initiation of service.

4. The Procedures Manual defines "Essential" NSEP telecommunications service requirements as those which are essential to satisfy NSEP needs but not as critical as Emergency NSEP requirements. They include all services or circuits assigned an NCS/FCC approved restoration priority. In addition, certain "exercise" telecommunications services may be designated Essential services. These include:

> (1) The minimum quantity of services essential to permit safe conduct of an exercise and/or achievement of primary exercise objectives. Only those services in support of exercises which involve the movement of personnel, weapons systems, munitions or other critical materials, or the control of aircraft are included.
>
> (2) Short-notice exercise services resulting from changes in exercise locations or scenarios which could not reasonably have been foreseen, and without which the exercise cannot be conducted safely or effectively. (Manual at 14-15).

Finally, telecommunications services in support of (1) activities conducted pursuant to the Foreign Intelligence Surveillance Act; (2) the President or Vice-President; and (3) the conduct of foreign affairs (i.e., visiting foreign heads of state or similar dignitaries, permanent diplomatic and consular missions in the U.S., and significant international conferences, meetings, or events held in the U.S.) as certified by the Secretary of State, may be designated Essential NSEP Telecommunications services.[5]

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[4] Certification can be made by the head or director of a Federal agency, commander of a unified/specified command, chief of a military service, or a commander of a major military command.

5. The Manual sets out a four-step procedure to be used to satisfy NSEP telecommunications service requirements. The first step is identification, *i.e.*, governmental agencies and other entities requesting NSEP services must determine whether their requests qualify as NSEP telecommunications in accord with the definition and categories described above. Next, when an NSEP need has been identified, NSEP procedures or treatment must be invoked. This is accomplished by an authorized official making a declaration, usually in a service order or other requesting documentation,[6] that NSEP treatment is necessary to satisfy service requirements.[7] The documentation containing NSEP invocations must identify the invoking official by name, rank or title, organization and telephone number. (Manual at 19, 21). Officials authorized to invoke NSEP telecommunications include "the head or director of a federal agency, commander of a unified/specified command, chief of military service, or commander of a major military command." The Manual permits delegation of the authority to invoke NSEP procedures from authorized officials to a General or Flag Officer or the equivalent civilian level (e.g., Senior Executive Service).[8] With respect to Essential NSEP requirements, as opposed to Emergency requirements, the Manual states that the invocation of NSEP procedures "normally will not occur until after a service date has been quoted by a vendor and determined by the [user] to be unsatisfactory. The [user] should . . . explore and exhaust alternative approaches (*e.g.*, escalation within the vendor organization, other vendors) to obtaining the service when required." (Manual at 20).

6. Verification, the third step in NSEP telecommunications procedures, is an optional step whereby entities can determine whether NSEP procedures were properly invoked and used for

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[5] In addition, Section VI of the Manual, entitled "Relationship to Other Activities" states that "telecommunications services acquired from AT&T or the BOCs under [the NSEP waiver of the Computer Inquiry II decisions, *see* Customer Premises Equipment, CC Dkt. 81-893, 49 Fed. Reg. 28108 (July 10, 1984); Customer Premises Equipment, 99 FCC 2d 1085 (1985)] are NSEP."

[6] In limited circumstances, when time is of the essence, oral NSEP invocation will suffice. However, the Procedures Manual requires that written confirmation follow within 48 hours of oral invocation. (Manual at 18, 21).

[7] The NCS must also be given notification when NSEP procedures are invoked.

[8] In addition, authority to invoke Emergency, but not Essential, NSEP requirements may be delegated to a duly authorized Federal Coordinating officer or Federal Emergency Communications Coordinator (Manual at 18).

properly identified service requests. Verification requests may be oral or written and are to be directed to the organization or entity requesting NSEP treatment. The requests may be escalated, if necessary, to the National Coordinating Center (NCC).[9] The Manual permits any government or industry entity to request verification, but requires that parties responding to NSEP requests (*i.e.*, carriers and other telecommunications service vendors) not delay processing NSEP requests pending verification.

7. The fourth and final step set out in the Procedures Manual is the implementation of NSEP telecommunications service(s). Included in the implementation step are requirements that government users (1) develop internal procedures to ensure that NSEP requirements are properly identified and invoked (government users are to provide copies of internal NSEP procedures to NCS); (2) be prepared to accept Essential NSEP services at the time they are requested and Emergency NSEP service as soon as supplied by vendor(s); (3) have available sufficient funds to pay additional costs incurred by vendors in meeting service requests for which the government user is responsible; and (4) ensure that status information is provided to appropriate agency personnel responsible for the validation and coordination of NSEP needs. (Manual at 24-25, 35).

8. Implementation responsibilities assigned to industry entities responding to NSEP requests include a requirement that vendors provide NCC or the government contracting entities with pertinent status information regarding the NSEP services they have provided or restored. The Manual also enumerates "specific responsibilities of several industry entities"[10] and provides, in cases of multiple conflicting NSEP telecommunications requests, that affected government or industry entities may request assistance from the NCC in resolving the conflict. In the event that NCC is unable to bring the conflict to resolution, the Procedures Manual provides that the matter may be referred to the Manager of NCS, or the Joint Telecommunications Resources Board in

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[9] NCC is a joint industry-government operations center whose mission is to assist in the initiation, coordination and restoration of NSEP telecommunications services or facilities. The NCC was officially established in 1984 with eleven telecommunications industry entities, the United States Telephone Association and NCS participating.

[10] These responsibilities are separated in individual paragraphs pertaining to each service vendor. The paragraphs are general in nature and add no specific additional responsibilities to vendors satisfying NSEP requests.

accordance with Section 2(b)(3), Executive Order No. 12472. (Manual at 26, 31).[11]

9. The Manual contains a section relating to the costs incurred in handling NSEP requests for expedited service. The Manual notes that the identification of NSEP telecommunications service requirements does not require a vendor to take action or to incur costs. Even when satisfying NSEP requirements (*i.e.*, providing or restoring services) vendors may provide services without extraordinary action and, thus, may do so without incurring additional costs. The Manual acknowledges, however, that invocation of NSEP procedures normally will cause vendor(s) to take action and, therefore, may result in additional costs to be charged to the requesting government user. The Manual provides that, "under all circumstances," identifying and/or invoking government entities must plan for and be prepared to pay additional costs for which the user is responsible. (Manual at 31–32). This general statement applies to both Emergency and Essential services.[12] At the same time, when NSEP procedures are invoked for Essential services, as opposed to Emergency Services, the invoking entity may specify a dollar limit regarding overtime and expediting charges. Finally, the Manual prohibits the use of NSEP procedures to compensate for or overcome inadequate advance planning. It states that such use of NSEP procedures could result in adverse regulatory or judicial action. (Manual at 12).

III. Pleadings

10. The parties submitting comments in this proceeding support the petitioner's basic premise that government interests regarding NSEP requirements should be met by carriers in accordance with the Procedures Manual and that compliance with the Manual should not subject complying carriers to the risk of violating the Communications Act's proscriptions against providing service on an unduly or unreasonably discriminatory basis. MCI, for example, notes that a carrier committed to serving

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[11] The Joint Telecommunications Resources Board (JTRB), which was established by Executive Order 12472, note 1 *supra*, provides assistance to the Office of Science and Technology Policy on NSEP telecommunications matters.

[12] If, however, vendors commit to provide service as of a specified date, subsequent government invocation of NSEP status to enable the vendor to meet the service date normally will not result in extra cost to the user. The Manual provides that additional costs incurred when unforeseeable events affect service dates, are subject to negotiation in accordance with applicable tariffs or contracts.

Federal government telecommunications needs must, at times, assume the burden of meeting those needs under extraordinary circumstances. It concludes that insulating carriers from the risk of being found in violation of the Act will ensure the willingness of carriers to meet these vital needs of the government.

11. AT&T and MCI point out, however, that while the Manual recognizes that parties invoking NSEP requirements must compensate vendors for overtime or expediting charges incurred when Emergency NSEP services are provided, the Procedures Manual provides a qualification that invoking entities may set payment limits regarding overtime and expediting charges that arise when Essential NSEP services are provided.[13] AT&T and MCI agree that, because immediate provisioning may be required for both Emergency and Essential services and carriers providing services in either category may unavoidably incur additional costs, the Procedures Manual should require that carriers be fully compensated for any such costs.[14] AT&T contends that the Manual's requirement that vendors operate within the restraints of a maximum limit for essential services is unworkable because, in many cases, requested service dates in either the Emergency or Essential category may be equally short and may thus require extraordinary effort on the part of carriers satisfying such requests. MCI asserts that the ceiling cap raises two problems: it may force carriers to supply services at below tariff rates in non-emergency situations, and it may require carriers to expend additional resources to monitor the costs of their operations in an effort to ensure that the ceiling limits are observed. In addition, MCI objects to the Manual's treatment of exercise communications. MCI argues that the Manual is flawed in that it defines exercise communications as NSEP but does not require that, to qualify as NSEP, exercise communications requests arise in emergency, extraordinary, or unforeseen circumstances.[15]

12. Reply comments were submitted by GTE and FEA. GTE agrees with comments suggesting that the Commission's approval be conditioned on the removal of the ceiling limit the Procedures Manual imposes upon expediting charges for Essential NSEP services.[16] It suggests that the Manual be modified using

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[13] Specifically, the Manual provides that invocation of NSEP telecommunications procedures to obtain Essential services must contain "authorization for the expenditure of any overtime or expediting charges that may be incurred . . . with a specified not-to-exceed amount, if any." (Manual at 21).

[14] AT&T comments at 5-7, MCI comments at 4-6.

[15] MCI comments at 3-4.

[16] GTE reply comments at 4.

language proposed by AT&T.[17] Objecting to the modifications suggested by AT&T and MCI, FEA replies that the arguments raised by these commenters do not address the lawfulness of the Manual. Rather, according to FEA, objections which suggest that the Manual gives the government authority to compel carriers to supply essential services below tariffed rates are related to the Executive Branch's definition of NSEP telecommunications and to the acquisition practices of FEA. FEA contends that the resolution of these disputes is beyond the scope of the Commission action it has requested. According to FEA the responsibility for defining NSEP telecommunications services and developing acquisition practices resides with the Executive Branch. Thus, FEA encourages the FCC to defer to FEA on these matters. FEA reasons that allowing ceiling limits on costs imposed upon the provision of Essential services are necessary to accommodate Federal budgetary concerns and funding restrictions. FEA points out that the Manual requires agencies to have funds available to meet the costs of NSEP requests and, thus, the ceiling provision is included to prevent an organization from incurring expenses in excess of the organization's budget appropriations. FEA argues, in addition, that because nothing in the Manual compels carriers to provide services below cost or at less than tariffed rates, if an agency's spending limits are insufficient to cover the costs of providing an Essential service, vendors may simply decline to provide requested services.

13. FEA states further that MCI is mistaken in its claims that the Manual provides for NSEP treatment of exercise services without requiring that these service requests arise in emergency or extraordinary circumstances. According to FEA, the Manual provides that exercise telecommunications service orders may be placed only after requesting agencies show that normal methods of providing requested services are infeasible. FEA notes that the Manual limits exercise services eligible for NSEP designation to "(t)he minimum quantity of services essential to permit safe conduct of an exercise . . . ," and short notice exercise services " . . . without which the exercise cannot be conducted safely or effectively."

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[17] AT&T suggests that the last sentence of Section VIII.B.2.c. be deleted and replaced with the following language:

> Such an order must also authorize the expenditure of any overtime or expediting charges that may be incurred by the vendor in providing the service(s), as necessary and to the extent provided for by the applicable tariff, contract or as otherwise agreed.

IV. Discussion

14. The Communications Act, among other things, obligates interstate common carriers to provide interstate services upon reasonable request and prohibits them from giving any undue or unreasonable preference or advantage to any person or class of persons. 47 U.S.C. §§ 201, 202. Failure to comply with these requirements could subject carriers to both public and private liability. The satisfaction of the federal government's telecommunications NSEP requirements could require that those needs be given priority over the needs of other users, resulting in the other users being discriminated against. NCS and the commenting carriers seek to eliminate the carriers' exposure to liability for honoring NSEP requests.

15. In addition to regulating interstate common carriers, the Commission is charged with promoting the safety of life and property and with ensuring effective communications for "the purpose of the national defense." 47 U.S.C. § 151. In commenting on our defense responsibilities we have stated that "all provisions of the Act must be read in light of that statement of purpose." *MTS and WATS Market Structure*, 73 FCC 2d 222, 230 (1979). In balancing these potentially conflicting responsibilities, we have established, by rule, that certain NSEP intercity private line circuits are entitled to restoration priority over other circuits. These rules do not address provisioning of private line service or the provisioning or restoration of switched service.

16. The NCS has determined that the existing RP rules are outdated and cannot satisfy the government's requirements for precedence and priority treatment for its NSEP telecommunications services, particularly given the divestiture of the Bell Operating Companies from AT&T. Therefore, NCS, working with industry representatives and government officials, has been developing a Telecommunications Service Priority System (TSP) to replace the Commission's RP Rules.[18] The TSP, as currently envisioned, would be broader than the RP System, would include service provisioning and restoration, and would apply to a greater variety of circuits than the private lines currently covered. It is

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[18] The authority under which NCS is operating in this endeavor is Executive Order 12472, which directs the NCS to "develop plans and procedures for the management, allocation and use, including the establishment of priorities or preferences, of federally owned or leased telecommunications assets under all conditions of crisis or emergency." The TSP system is a part of a broad effort by the U.S. Government, primarily NCS, and the telecommunications industry to ensure that NSEP telecommunications are adequately provided in the post-divestiture environment.

expected that when the TSP System design is completed, NCS will request that the FCC begin a rulemaking proceeding to adopt rules to replace the current RP System with the new TSP System.

17. The Procedures Manual seeks to provide interim procedures to be followed in areas not already covered in the RP rules pending our approval and subsequent industry and government implementation of the TSP system.[19] As such, we believe that compliance with the procedures outlined in the Manual generally will not result in unjust or unreasonable discrimination in favor of the user invoking NSEP procedures or otherwise violate the Commission's rules and policies. The persons who can invoke NSEP procedures are sufficiently limited and there is sufficient cautionary language relating to the need to keep invocations to the minimum necessary to satisfy NSEP needs. We are encouraged by the inclusion of statements, among others, to the effect that NSEP procedures will not be invoked to make up for time lost as a result of inadequate advance planning and that before invoking NSEP procedures users must attempt to satisfy their requirements through other means. In all likelihood the procedures outlined in the Manual will ensure that NSEP needs are satisfied in accordance with Section I of the Communications Act without violating other provisions of the Communications Act. Therefore, to the extent indicated herein and subject to the conditions discussed below, we will grant the requested relief.

18. *Definition of NSEP*. While we agree with FEA that it is primarily its responsibility to define NSEP Telecommunications, we are required to review that definition in order to determine whether carriers expediting services that reasonably fall under the definition would be providing service in a manner inconsistent with the Commission's rules and policies. It is important to limit the definition of NSEP telecommunications to cover the minimum number of services necessary to provide for the national security and emergency preparedness so that other services are not unnecessarily disrupted and other users are not unfairly disadvantaged. The more narrow the definition, the less likely there will be abuses of the system resulting in unwarranted resources being devoted to services for which priority treatment is not necessary, to the detriment of other users of the network. At the same time,

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[19] Although the Manual speaks in terms of "provisioning and restoration" of NSEP services, it also specifically states that until the TSP system is adopted by the FCC restoration of NSEP services will "continue to be governed by the provisions of the existing .. RP system." The Manual recognizes that its guidelines "apply primarily to the provisioning of NSEP telecommunication."

we recognize that NSEP situations potentially include a wide variety of emergencies and, therefore, a very specific definition might not cover the broad range of circumstance that might require expedited treatment. We also believe that the existence of a definition of NSEP where none previously existed provides some degree of assurance that NSEP procedures will not be used excessively or unnecessarily.

19. The definition of NSEP Telecommunications in the Manual is quite broad. Other sections of the Manual, however, limit the practical effect of such a broad definition. For example, the limitations on who may invoke NSEP procedures and the general cautionary language help to ensure that services will not unnecessarily be designated NSEP.[20] We believe, however, that the Manual would be clearer and further protect against an overly broad application of NSEP procedures if it drew a clearer connection between the NSEP definition and the Emergency and Essential categories. Therefore we shall condition our declaratory ruling upon the revision of the Manual's definition of NSEP (Section V.A.) as follows:

> *NSEP Telecommunications*. Telecommunication services which are used to maintain a state of readiness or to respond to and manage any event or crisis (local, national or international), which causes or could cause injury or harm to the population, damage or loss of property, or degrades or threatens the national security emergency preparedness posture of the United States. *Services that are eligible for designation as NSEP Telecommunications are those services specified in Section VIII.A.I. (Emergency services) and in Section VIII.A.2. (Essential services).*

In addition, Section VIII.A. should be amended by adding the words "Telecommunications as defined in Section V.A." after the words "qualifies as NSEP".[21]

20. *Regulatory Oversight.* The Procedures Manual does not include an oversight role for this Commission in the NSEP process. For example, the Manual does not require the NCS,

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[20] In addition, as indicated below we are conditioning our order upon NCS providing the Commission with semi-annual reports on NSEP invocations. Should we discover that the definition of NSEP Telecommunications is being applied in an unnecessarily broad manner, we will take appropriate action at that time.

[21] With respect to the argument that MCI raises relating to the inclusion of exercise communications, we believe that taken as a whole the document prevents the government from invoking NSEP procedures when there are no emergency, extraordinary or unforeseen circumstances. The Manual provides that NSEP procedures will not be invoked to make up for time lost as a result of inadequate advance planning and that before invoking NSEP procedures, users must attempt to satisfy their requirements through other means.

government users or industry entities to provide the FCC with summary information or periodic reports of NSEP service requests. Nor does the Manual explicitly state that the FCC may request verification of NSEP requests. The Commission has an obligation, as NCS recognizes by the filing of the petition for declaratory ruling, to ensure that national security communications requirements are adequately provided for, *see* 47 U.S.C. § 151, and, at the same time, that requirements that are not truly NSEP requirements are not granted priorities to the undue detriment of other users. Therefore, we will condition grant of this declaratory ruling upon the NCS forwarding to the Commission, on a semi-annual basis,[22] a summary of the information it has received during the year relating to the times and events for which NSEP procedures have been invoked, whether the NSEP requirement was adequately handled, and whether any additional charges were incurred. Moreover, the Manual should explicitly state that the Commission, in the performance of its oversight function, may request verification of NSEP requests.

21. *Cost Issues.* AT&T and MCI raise issues relating to the section of the Manual that provides that a user may specify a "not-to-exceed amount" when authorizing expenditure of overtime or expediting charges for initiation of Essential services. It seems only reasonable, however, that the government be able to place a limit on the amount of money it is willing to spend to expedit Essential services. Essential services, by definition, are not as critical as Emergency services. In addition, as FEA points out, the "not to exceed" provision does not compel service at less than tariffed rates; if the government has insufficient funds the carrier may refuse to expedite service.

22. *Other Matters.* Finally, there are several minor editorial changes that should be made. In Section II, the Manual states that it is issued pursuant to the authority vested in the President and the FCC in accordance with the Communications Act of 1934. This seems to characterize incorrectly the genesis of this document. The sentence should, therefore, be amended to read that the Manual has been developed by NCS in accordance with Executive Order 12472 and that the FCC has found that actions taken in accordance with its provisions are presumed to be consistent with the FCC's rules and policies. In addition, page 10 states that "all FCC licensed carriers are eligible for selection to provide NSEP telecommunications services." We note, however, that licensing is

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[22] Reports will be due on January 31 for the preceding July through December and on July 31 for the preceding January through June time periods.

inapplicable to some common carriers. Thus, this provision should be modified to provide that all telecommunications service vendors are eligible for selection.

V. Conclusion

23. We are satisfied that the Procedures Manual, as currently written and as an interim step pending the adoption of the TSP system, generally provides procedures adequate to ensure that National Security and Emergency Preparedness concerns are satisfied in a manner consistent with the Commission's Rules and policies.[23] While we cannot guarantee that under no circumstances could an action taken under authority of the Procedures Manual rise to a level of unreasonableness that would violate the Communications Act, we do not foresee this happening. The procedures appear reasonable and it is important for national security reasons that carriers know that actions they take to meet NSEP requirements should not later be subject to potential liability. Accordingly, we find that carrier actions in response to requests made in accordance with the Procedures Manual are prima facie lawful. Any party challenging discriminatory treatment occasioned by a request made pursuant to the Manual would have a very heavy burden to demonstrate its unreasonableness. Thus, to the extent indicated herein and as conditioned above, the declaratory ruling sought by the Secretary of Defense is granted.

24. Accordingly, IT IS ORDERED, that the petition for declaratory ruling filed by the Secretary of Defense is GRANTED to the extent indicated above and as conditioned herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[23] We note that the Manual states that it is "subject to revision when warranted." Obviously, this declaratory ruling applies only to the Manual as currently written.

Common Carrier, Data Processing Service
Common Carrier, Specialized Services
Computer Regulation
Deregulation
Tariff, Regulation of

Report and Order in the Third Computer Inquiry adopted to implement a revised regulatory framework, and to address specific problems that have arisen under the Second Computer Inquiry.

Supplemental Notice in the Third Computer Inquiry is adopted to consider certain issues on which further comment may be appropriate.
—*Third Computer Inquiry*
CC Docket No. 85-229

FCC 86-252

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matters of:

Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and	
Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof	CC Docket No. 85-229
Communications Protocols under Section 64.702 of the Commission's Rules and Regulations	

REPORT AND ORDER

Adopted: May 15, 1986; Released: June 16, 1986

BY THE COMMISSION:

TABLE OF CONTENTS

Paragraph

I. INTRODUCTION 1–8
II. BACKGROUND
  A. First Computer Inquiry. 9
  B. Second Computer Inquiry. 10–14
  C. All Carrier Rule and Disclosure Order. 15
  D. Enhanced Services Classifications and Waiver Proceedings. 16
    1. Mass Calling and VMS Services. 17–19
    2. Protocol Processing. 20–23
  E. Modification of Final Judgment. 24–26
  F. BOC Separation Order. 27–32
  G. Protocol Conversion Waivers. 33–35
  H. AT&T Structural Relief Order and Related Proceedings. 36–38
  I. BOC Structural Relief Notice. 39–40
  J. The Notice. 41–45
III. ELIMINATION OF STRUCTURAL SEPARATION FOR THE ENHANCED SERVICES OPERATIONS OF AT&T AND THE BOCS 46
  A. Positions of the Parties. 47
    1. Comments Supporting the Removal of Structural Separation for AT&T and the BOCs.
      a. General. 48–52
      b. AT&T. 53–55
      c. The BOCs. 56–58
    2. Comments Opposing the Removal of Structural Separation for AT&T and the BOCs.
      a. General. 59–64
      b. AT&T. 65–68
      c. The BOCs. 69–71
  B. Discussion.
    1. Standard for Reviewing the Applicability of Structural Separation to the Enhanced Services Operations of AT&T and the BOCs. 72–77
    2. Costs and Benefits of Structural Separation for AT&T Enhanced Services Operations. 78
      a. Costs. 79–81
      b. Benefits. 82–87
    3. Costs and Benefits of Structural Separation for BOC Enhanced Services Operations. 88
      a. Costs. 89–94
      b. Benefits. 95–97
    4. Removal of Structural Separation for AT&T's and the BOC's Enhanced Services Operations. 98–99

Paragraph
IV. ALTERNATIVE REGULATORY FRAMEWORKS 100
  A. The Proposal for a New Regulatory Framework. 101–103
    1. Positions of the Parties. 104–107
    2. Discussion. 108–110
  b. Comparably Efficient Interconnection, Open Network Architecture, and Other Nonstructural Safeguards. 111–116
    1. Comparably Efficient Interconnection.
      a. Application of CEI to Particular Carriers. 117
        (1) Positions of the Parties.
          (a) Application to AT&T and the BOCs. 118–123
          (b) Application to the Independents. 124–126
        (2) Discussion.
          (a) Application to AT&T and the BOCs. 127–131
          (b) Application to the Independents. 132
      b. CEI Standards and Parameters. 133–135
        (1) Positions of the Parties.
          (a) General CEI Standards. 136–138
          (b) Collocation. 139–141
          (c) CEI Parameters. 142–146
        (2) Discussion.
          (a) Equal access standard. 147–150
          (b) Collocation 151–153
          (c) CEI Parameters. 154–166
      c. CEI Pricing. 167
        (1) Positions of the Parties. 168–170
        (2) Discussion. 171–186
      d. CEI Plans and Nondiscrimination Reporting.
        (1) Positions of the Parties.
          (a) CEI Plans. 187
          (b) Nondiscrimination Reporting. 188–189
        (2) Discussion.
          (a) CEI Plans. 190–191
          (b) Nondiscrimination Reporting. 192–193
      e. ISDN. 194–195
        (1) Positions of the Parties. 196–197
        (2) Discussion. 198–200
    2. Open Network Architecture. 201
      a. Positions of the Parties. 202–209
      b. Discussion. 210–213
        (1) Unbundling Requirement. 214–218
        (2) CEI Requirement. 219

Paragraph
(3) Development of Open Network Architecture. 220
(4) Open Network Architecture Plans. 221–222
3. Nonstructural Safeguards for the Enhanced Services Operations of AT&T and the BOCS. 223–225
a. Cost Allocation Procedures.
(1) Positions of the Parties. 226–233
(2) Discussion. 234–240
b. Network Information Disclosure.
(1) Positions of the Parties. 241–245
(2) Discussion. 246–255
c. Customer Proprietary Information.
(1) Positions of the Parties. 256–259
(2) Discussion. 260–265
V. TREATMENT OF PROTOCOL PROCESSING FUNCTIONS 266–267
A. Alternatives Presented in the Notice. 268–272
1. Positions of the Parties. 273–288
2. Discussion. 289–291
B. Analysis of Protocol Processing. 292–300
1. The Functional Nature of Protocol Processing 292–298
a. Functional Aspects of Protocol Processing. 292–297
b. Regulatory Treatment Based on Functional Aspects. 298
2. The Competitive Nature of Protocol Processing. 299–300
a. Competitive Aspects of Protocol Processing. 299
b. Regulatory Treatment Based on Competitive Aspects. 300
C. Interim Regulatory Treatment. 301
D. Other Specific Changes. 302–306
1. Positions of the Parties. 302–305
2. Discussion. 306
VI. VOICE MESSAGE STORAGE SERVICES 307–308
A. Positions of the Parties. 309–312
B. Discussion. 313–317
VII. NETWORK CHANNEL TERMINATING EQUIPMENT 318–321
A. Classification of NCTE as CPE. 322–325
1. Positions of the Parties. 322–324
2 Discussion. 325
B. Removal of Structural Separation for BOC Provision of CPE. 326–332
1. Positions of the Parties. 326–329
2. Discussion. 330–332
C. Multiplexer Exception. 333
1. Position of the Parties. 334–335
2. Discussion. 336
D. Regulated Offering of NCTE Functions 337–338

Paragraph

VIII. LEGAL CONSIDERATIONS
A. General. 339–342
1. Positions of the Parties. 339
2. Discussion. 340–342
B. Relations with the States. 343–344
1. Positions of the Parties. 345–346
2. Discussion. 347–348
C. International Applicability. 349–352
1. Positions of the Parties. 349–350
2. Discussion. 351–352
IX. REGULATORY FLEXIBILITY CERTIFICATION 353
X. ORDERING CLAUSES. 354–356
Appendix A — List of Commenters.

I. INTRODUCTION

1. On August 16, 1985, we released a *Notice of Proposed Rulemaking*[1] in this docket instituting a comprehensive reexamination of the rules and policies for regulating telecommunications and computer services that we developed in the *Second Computer Inquiry* (*Computer II*).[2] Motivating this reexamination was our tentative conclusion that, in order to fulfill our statutory obligation to "make available, so far as possible, to all the people of the United States rapid [and] efficient . . . communications service . . . ,"[3] our existing rules and policies should be reworked in light of the continuing significant changes in the communications and computer services marketplaces. We expressed the view that those rules are outmoded in ways that have become evident with the passage of time and our accumulation of experience.[4]

2. In the *Notice* we addressed several areas of particular importance. We proposed changes in the unregulated "enhanced services" category of *Computer II*, which includes competitive

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[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Notice of Proposed Rulemaking, CC Docket No. 85-229, ________ FCC 2d ________, 50 Fed. Reg. 33581 (Aug 20, 1985) (the *Notice*).

[2] Second Computer Inquiry, *Final Decision*, 77 FCC 2d 384 (*Final Decision*), *modified on reconsideration*, 84 FCC 2d 50 (1980) (*Reconsideration Order*), *further modified on reconsideration*, 88 FCC 2d 512 (1981) (*Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F. 2d 198 (D.C. Cir. 1982) (*CCIA v. FCC*), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration*, FCC 84-190 (released May 4, 1984).

[3] Section 1, Communications Act of 1934 (the Communications Act or the Act), 47 USC § 151 (1984).

[4] *See Notice* at paras. 6–16, 30–33.

data processing services that are offered in conjunction with communications services. We sought to tailor more directly the extent of our regulation to the degree of competition in particular markets, in order to permit the public to realize the full benefits of competition where competition can function.[5] We also focused on the structual separation requirements that we established in *Computer II* for the provision of enhanced services by the American Telephone and Telegraph Company (AT&T)[6] and later applied to the divested Bell Operating Companies (the BOCs).[7] We tentatively found that the costs of those requirements in lost innovation, inefficiency, and delay outweigh their benefits in preventing cross-subsidization and discrimination;[8] and we proposed replacing such requirements with nonstructural safeguards.[9] In addition, we recognized that the advent of more flexible, competition-oriented regulation would permit dominant carriers to provide enhanced services integrated with their basic network facilities. We requested comment on whether, as a condition for such integration, we should require such carriers to provide other enhanced service vendors with comparably efficient interconnection (CEI) opportunities.[10] We indicated that such a CEI requirement could promote the efficiencies of competition in enhanced services markets by permitting carriers to participate in such markets provided they open their networks to multiple competitors. Finally, we requested comment on numerous specific issues, including the appropriate regulation of so-called "protocols-type processing" or protocol processing services,[11] Voice Message Storage (VMS) services,[12] and Network Channel Terminating

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[5] *See Notice* at paras 26–37, 49–63.

[6] *See supra* note 2.

[7] *See* Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket 83-115, *Report and Order*, 95 FCC 2d 1117 (1984) (*BOC Separation Order*), *aff'd sub nom. Illinois Bell Telephone Co. v. FCC*, 740 F. 2d 465 (7th Cir. 1984), *aff'd on reconsideration*, FCC 84-252, 49 Fed. Reg. 26056 (1984) (*BOC Separation Reconsideration*), *aff'd sub nom. North American Telecommunications Association v. FCC*, 772 F. 2d 1282 (7th Cir. 1985).

[8] *Notice* at para. 19.

[9] *Id.*

[10] *Id.* at para. 120.

[11] *Id.* at paras. 70–114. The *Notice* generically referred to the enhanced services defined in the first clause of Section 64.702(a) of our Rules, 47 CFR § 64.702(a) (1985), as "protocols-type processing" functions. Hereinafter we refer to "protocols-type processing" functions as "protocol processing" functions.

[12] *Id.* at paras. 134–40.

Equipment (NCTE), a type of customer premises equipment (CPE).[13]

3. In this *Order*, we replace structural separation for the enhanced services operations of AT&T and the BOCs with nonstructural safeguards, although we defer to a *Supplemental Notice* in this docket the question of whether such safeguards should apply to the independent telephone companies (the Independents).[14] We conclude that, relative to nonstructural safeguards, the structural separation requirements impose significant costs on the public in decreased efficiency and innovation that substantially outweight their benefits in limiting the ability of AT&T and the BOCs to make unfair use of their regulated operations for the benefit of their unregulated, enhanced services activities.

4. In removing structural separation, we decline to adopt the proposal in the *Notice* for a new regulatory framework based on economic analyses of markets for specific services. Instead, we maintain the existing basic and enhanced service categories and impose CEI and Open Network Architecture requirements as the principal conditions on the provision of unseparated enhanced services by AT&T and the BOCs. The CEI standards, which will be in effect on an interim basis pending our approval of a carrier's Open Network Architecture Plan, require a carrier's enhanced services operations to take under tariff the basic services it uses in offering unseparated enhanced services. Such basic services must be available to other enhanced services providers and users under the same tariffs on an unbundled and functionally equal basis. Tariffed rates for CEI are required to include a rate element for transmission costs, which may include distance-sensitive charges, and averaged or equal-priced elements for interconnection and traffic concentration costs. The carriers may not discriminate in favor of their own enhanced services operations in providing CEI and must file periodic reports to substantiate that nondiscrimination.

5. Pursuant to our CEI requirements, AT&T and the BOCs will be permitted to offer specific enhanced services on an unseparated basis if they: (a) file a CEI Plan and associated tariff material

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[13] For a definition of CPE, *see* Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services, *Report and Order*, 95 FCC 2d 1276, para. 1, n. 2 (1983).

[14] *See* Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquriy), *Supplemental Notice of Proposed Rulemaking*, CC Docket No. 85-229, Phase II, FCC No. 86-253 (released June ____, 1986) (*Supplemental Notice*).

demonstrating that their implementation of a particular enhanced service satisfies our CEI requirements; (b) file a detailed cost allocation plan based on the proposals of our *Joint Cost Notice*;[15] and (c) adhere to interim requirements relating to network disclosure and customer proprietary network information (CPNI); and (d) receive our approval that their plans and actions satisfy our requirements. We will subject these interim, service-specific filings to expedited review after first putting them out for public comment.

6. As preconditions to complete structural relief for their enhanced services operations, we require AT&T and the BOCs to: (a) implement approved Open Network Architecture Plans, to be filed by February 1, 1988, that satisfy our CEI requirements and additional unbundling requirements through a set of tariffed Basic Service Elements; (b) file detailed cost allocation plans that comply with the requirements to be established in the pending *Joint Cost* proceeding; (c) adhere to modified versions of the existing network information disclosure requirements; and (d) follow certain procedures with respect to their basic services CNPI. While we specify the majority of these requirements in this *Order*, we defer to the *Supplemental Notice* certain aspects of the nondiscrimination, network information disclosure, and CPNI requirements.

7. In the *Notice*, we proposed three alternative regulatory approaches for protocol processing; however, we conclude in this *Order* that none of them should be adopted. Instead, we identify two analyses of technical and market characteristics of protocol processing that lead to disparate regulatory treatments. Because of the close technical and functional relationships between protocol processing and basic communications, an approach under which protocol processing would be treated as a neutral "adjunct" service could be an appropriate regulatory response. This approach would require that protocol processing be regulated in the same fashion as the underlying service — whether basic or enhanced — with which it is associated in a particular offering. However, as a pragmatic matter, we recognize that protocol processing functions are offered in competitive, unregulated markets, and we seek to avoid the potential for any unnecessary

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[15] Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities, and the Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies, to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and Their Affiliates, *Notice of Proposed Rulemaking*, CC Docket No. 86-111, FCC No. 86-146 (released April 17, 1986) (*Joint Cost Notice*).

reregulation in such markets. Furthermore, it appears that the nonstructural safeguards we adopt in this *Order* for the unseparated provision of enhanced services in general by AT&T and the BOCs may be appropriate for protocol processing as well. Accordingly, an alternative regulatory treatment may be to retain protocol processing functions in the existing enhanced services definition and subject them to those nonstructural safeguards. Because these approaches differ from those we proposed in the *Notice*, and since we wish to have as complete a record as possible before adopting any changes in this area, we defer to the *Supplemental Notice* any final action on the regulatory treatment of protocol processing. Pending that final action, we maintain the current regulatory status of protocol processing, including the availability of waivers from the structural separation rules for specific protocol conversions.

8. In this *Order*, we also retain the status of VMS services as enhanced services. Further, we retain the classification of NCTE as CPE, but defer the question of structural relief for the BOCs' provision of NCTE to the proceeding initiated by the *BOC Structural Relief Notice*.[16] We also defer to the *Supplemental Notice* the question of whether carriers should be able to provide certain NCTE functions on a tariffed basis as part of their network services offerings. Finally, in light of the provisions of this *Order* and the actions we have proposed in the *BOC Structural Relief Notice*, we defer to the *Supplemental Notice* certain issues raised in the *Notice* concerning the "multiplexer exception" to our CPE rules.

II. BACKGROUND

A. First Computer Inquiry.

9. The regulatory issues spawned by the technical confluence of regulated communications services and unregulated data processing services have been among the most important matters this Commission has dealt with over the past 20 years. Indeed, during this period, we have addressed these issues, in one proceeding or another, on a virtually continuous basis, as we have sought to revise and refine our regulatory approach in light of rapidly changing technological and marketplace developments. We ini-

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[16] Provision of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, CC Docket No. 86-79, *Notice of Proposed Rulemaking*, FCC 86-113 (released March 28, 1986) (*BOC Structural Relief Notice*).

tially attempted to establish an appropriate regulatory framework for the provision of communications and data processing services in the *First Computer Inquiry* (*Computer I*).[17] In that proceeding, we established a three-part classification of computer and telecommunications services, based on their technical and functional characteristics, with a different regulatory treatment for each classification.[18] We determined not to regulate "data processing" services, which we found were being offered on a highly competitive basis. We regulated "communications" as common carrier offerings under Title II of the Communications Act. "Hybrid" services, which we defined as offerings that combine "[r]emote [a]ccess data processing and message-switching to form a single integrated service,"[19] were to be treated as either data processing or communications services based on Commission determinations as to which of the two functions were predominant in the particular hybrid service. We permitted common carriers other than AT&T and its Bell System subsidiaries to provide data processing services subject to a structural separation requirement; this requirement was designed to prevent such carriers from engaging in anticompetitive behavior such as discrimination or cross-subsidization of unregulated operations by regulated services. We did not establish requirements for AT&T and its subsidiaries based on our assumption that they were precluded from offering any type of data processing services by the terms of an antitrust consent decree then in effect (the *1956 Decree*).[20]

B. Second Computer Inquiry.

10. After *Computer I* took effect, technological and competitive developments in the telecommunications and computer industries exposed shortcomings in its definitional structure, and in particular its *ad hoc* approach to evaluating the "hybrid" category.[21] In light of such shortcomings, we conducted an extensive examination in the *Computer II* proceeding to determine the most

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[17] Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, *Tentative Decision*, 28 FCC 2d 291 (1970); *Final Decision and Order*, 28 FCC 2d 267 (1971) *aff'd sub nom. GTE Service Corp. v. FCC*, 474 F. 2d 724 (2d. Cir. 1973); *decision on remand*, 40 FCC 2d 293 (1973).

[18] *See* 47 CFR § 64.702 (1974).

[19] *Computer I*, 40 FCC 2d at 295; 47 CFR § 64.702(a)(5) (1974).

[20] *United States v. Western Electric Co.*. 13 Rad. Reg. (P&F) 2143, 1956 Trade Cas. (CCH) 71,134 (D.N.J. 1956).

[21] *See, e.g.*, AT&T Dataspeed 40/4 Tariff Revisions, 62 FCC 2d 21 (1977), *aff'd sub nom. International Business Machine Corp. v. FCC*, 570 F.2d 452 (2d Cir. 1978).

appropriate regulatory framework for the provision of data processing services by carriers and others. In the *Final Decision*, we found that because of technological change and consumer demand, communications and data processing technologies had become so intertwined in new service offerings that it was impossible to draw an "enduring line of demarcation" between them.[22] Accordingly, we adopted a new regulatory definitional scheme with two service categories: basic and enhanced.[23] We defined basic service as limited to "the common carrier offering of transmission capacity for the movement of information."[24] Data processing, computer memory or storage, and switching techniques can be components of a basic service if they are used solely to facilitate the movement of information. We further determined to continue to regulate basic service under Title II of the Act, since such services are "wholly traditional common carrier activities."[25]

11. In the *Final Decision*, we described an enhanced service as "any offering over the telecommunications network which is more than a basic transmission service."[26] We revised our Rules to define enhanced services by articulating those functions that we considered to be different from basic service:

> [T]he term "enhanced service" shall refer to services, offered over common carrier transmission facilities, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's additional, different or restructured information; or involve subscriber interaction with stored information.[27]

In evaluating the enhanced services market, we determined that it was truly competitive.[28] Because consumers were deriving substantial benefits from this competition, we found that regulation of enhanced services was unwarranted. We concluded that the basic and enhanced service dichotomy advanced the public interest by promoting regulatory certainty and by comporting with the actual development of the enhanced services industry. In the *Final Decision*, we also deregulated the provision of CPE.[29]

12. In the *Computer II* proceeding, we sought to maximize benefits for consumers by promoting competition in the provision

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[22] *Final Decision*, 77 FCC 2d at 430, para. 120.

[23] We also treated CPE as a separate category for regulatory purposes.

[24] *Final Decision*, 77 FCC 2d at 420, para. 93.

[25] *Id.* at 435, para. 131.

[26] *Id.* at 420, para. 97.

[27] Section 64.702(a) of the Commission's Rules, 47 CFR § 64.702(a).

[28] *Final Decision*, 77 FCC 2d at 433, para. 128.

[29] *Id.* at 439, para. 131.

of enhanced services and CPE. As in *Computer I*, we were concerned with the potential for anticompetitive conduct that could result from carrier participation in unregulated markets. We were particularly concerned that major carriers could use their control over basic services to discriminate against others' competitive services and products. We were also concerned that these carriers could misallocate costs from unregulated to regulated activities, allowing them to impose unfair burdens on regulated ratepayers and improperly cross-subsidize their competitive offerings. Accordingly, to guard against such abuses, we required major carriers to provide enhanced services and CPE only through corporate affiliates fully separated from their basic services operations.[30]

13. We did not expect the structural separation requirements to alter the incentives a carrier might have to engage in discrimination or cross-subsidization in enhanced services and CPE markets. We did expect, however, that structural separation would make such competitive abuses easier to detect and more difficult to accomplish. Under structural separation, transactions between a business organization's basic services operation and its enhanced services and CPE operations would have to cross corporate boundaries and would be recorded in separate books of account for regulated and unregulated affiliates. We decided to impose these requirements only if the benefits gained from promoting competition and protecting ratepayers would exceed the costs of complying with structural separation. On the basis of these considerations, we imposed the structural separation requirements only on AT&T.[31] We construed the *1956 Decree* to permit AT&T to offer enhanced services and CPE subject only to the structural separation requirements by finding that such activities were "incidental to the furnishing by AT&T or [its] subsidiaries of common carrier communications services,"[32] and this permissible under the terms of that decree.

14. Under the *Computer II* structural separation rules, the AT&T separate subsidiary was prohibited from providing basic services or owning any network or local distribution transmission

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[30] We generically refer to the separate subsidiary requirement as "structural separation."

[31] In the *Final Decision*, we applied the structural separation requirements to both GTE and AT&T. 77 FCC 2d at 466–75, paras. 215–32. In the *Reconsideration Order*, we concluded that the costs of those requirements as applied to GTE outweighed their benefits, and we limited structural separation to AT&T. 84 FCC 2d at 72–73, para. 66.

[32] *1956 Decree, supra* note 20, at § V(g).

facilities, while its basic services affiliates were prohibited from offering enhanced services or CPE. Those rules also strictly limited the interactions of the separate subsidiary with its basic service affiliates.[33] We required the separate subsidiary to obtain all transmission facilities necessary for providing enhanced services under tariff.[34] We required it to elect separate officers; maintain separate books of account; employ separate operating, installation, and maintenance personnel; and perform its own marketing and advertising. We further required it to deal with any affiliated manufacturing entity only on an arms-length basis and to utilize separate computer facilities in providing enhanced services. Moreover, the separate subsidiary was required either to develop its own software or to contract with non-affiliates for such software, except that it was permitted to obtain generic software embedded within equipment that its affiliate sold off-the-shelf to any interested purchaser (the Software Rule). AT&T subsequently established AT&T Information Systems, Inc. (AT&T–IS) as its separate subsidiary for enhanced services and CPE.

C. All Carrier Rule and Disclosure Order

15. We also decided to require AT&T's basic service affiliates to disclose network design and other network information. We imposed this requirement in light of our finding in the *Reconsideration Order* that all carriers are capable of obstructing competition in markets that utilize basic services by withholding from competitors information regarding their networks.[35] We required all carriers to disclose information regarding any new service or change in the network at a time reasonably before the implementation of a new service or change (the All Carrier Rule).[36] Because of AT&T's special position, we subjected it to an additional requirement that it disclose to the public any network information disclosed to its separate subsidiary.[37] We further refined AT&T's disclosure obligations in an order that specifically considered network service disclosure obligations.[38] In the *Disclosure Order*, we found that, in many instances, the characteristics of the

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[33] *See Final Decision*, 77 FCC 2d at 475–86, paras. 233–60; *Reconsideration Order*, 84 FCC 2nd at 75–86, paras. 72–105; 47 CFR § 64.702.

[34] 47 CFR § 64.702.

[35] *Reconsideration Order*, 84 FCC 2d at 82, para. 95.

[36] *See id.*; *see also* 47 CFR § 68.110(b).

[37] 47 CFR § 64.702(d)(2).

[38] Computer and Business Equipment Manufacturers Association, *Report and Order*, 93 FCC 1226 (1983) (the *Disclosure Order*).

intercity network determine whether an enhanced service or CPE offering would function properly.[39] Accordingly, we required AT&T to disclose all technical information concerning new network services or changes in existing network services, as well as "additional information which relates . . . to the timing of introduction, pricing, and geographic availability of new network services or capabilities . . . ."[40] We required this disclosure at the time AT&T provides such information to its separate subsidiary or to other entities for the benefit of its separate subsidiary. We also required AT&T to disclose technical and other information involving joint research and development by AT&T and its separate subsidiary, leading to the design or manufacture of any product that either affects the network interface or relies on a not-yet implemented interface. AT&T is required to disclose this information at the "make/buy" point, *i.e.*, the time when AT&T decides either to manufacture the product itself or to procure it from an unaffiliated entity.[41]

D. Enhanced Services Classifications and Waiver Proceedings Under the Computer II Framework.

16. After the *Final Decision*, numerous parties requested that we reconsider the regulatory framework that we had adopted in *Computer II*. We also received requests to clarify whether some specific services were enhanced or basic. In the *Reconsideration Order*, while affirming the basic/enhanced definitional scheme established in the *Final Decision*, we also established a process to enable parties to request waiver relief from the structural separation rules for a particular enhanced service or clarification of the regulatory classification of a particular service. In addition, we also specifically considered the classification of several offerings, including VMS, mass calling, and protocol processing services.

1. Mass Calling and VMS Services.

17. Prior to the *Reconsideration Order*, AT&T requested that its "Dial-It" mass calling services[42] and "Custom Calling II"

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[39] *Id.* at 1235–36, para. 29.

[40] *Id.* at 1238, para. 37.

[41] *Id.* at 1244, para. 58.

[42] Mass calling services, such as Dial-It services, are generally of two types: public announcement services, which store information such as sports reports or stock prices for retrieval by subscribers, and media stimulated calling services, which also store information for which calling is promoted through media such as television or radio. *Reconsideration Order*, 84 FCC 2d at 55, para. 13.

VMS services[43] be classified as basic so they could be offered pursuant to tariff. In the *Reconsideration Order*, we found that AT&T's Dial-It offering consists of two functional components: a transmission component, which is a basic function and may be offered under tariff, and an information retrieval component, which is enhanced and may not be tariffed.[44]

18. We concluded that services such as Custom Calling II are enhanced because of their information retrieval functions.[45] AT&T argued that Custom Calling II should be permitted to be provided as part of basic service even if it were enhanced, on the theory that it must be provided in the network if it is to be efficiently offered or ubiquitously available. We rejected this argument as not being supported by the record. We acknowledged, however, that situations might arise in which the structural separation requirements could foreclose the availability to consumers of enhanced services that a carrier could only provide through network facilities. For example, we stated that the technical characteristics of the service might require such integration or the economic characteristics of the service might dictate that if the separation requirements were strictly enforced, the service could not be offered at prices consumers were willing to pay. We indicated that we were prepared to consider requests for waiver of the structural separation requirements for a specific service if the party seeking the waiver could demonstrate that the public interest concerns addressed by structural separation were outweighed by the possibility of imposing unreasonable costs on consumers or rendering the service at issue uneconomic. As part of a waiver request, a petitioner was expected to provide detailed economic and technical information to support its assertions.[46]

19. AT&T subsequently petitioned us for a waiver of the structural separation requirements as they applied to the Custom Calling II services. In the *Custom Calling Denial Order*,[47] we denied this petition, finding that AT&T did not demonstrate that the imposition of the structural separation rules would result in unreasonable costs to consumers because of technical or economic

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[43] VMS service involve storage of telephone messages in the network for subsequent sending or retrieval. Examples of such services include those commonly referred to as "advance calling" and "call answering." *Id.*

[44] *Id.* at 56, para. 16.

[45] *Id.* at 55, para. 14.

[46] *Id.* at 58, para. 21.

[47] American Telephone and Telegraph Company Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations, *Memorandum Opinion and Order*, 88 FCC 2d 1 (1981) (*Custom Calling Denial Order*).

infeasibility.[48] Based on the comments received in that proceeding, we also found that "provided the necessary interconnection facilities are available from the local telephone companies, . . . other entities are willing to risk their capital to provide voice storage services similar to [Custom Calling II]."[49] We concluded that eliminating structural separation for AT&T's provision of such services could create costs for consumers by increasing AT&T's ability to cross-subsidize its enhanced services and by decreasing our ability to compel AT&T to provide nondiscriminatory access to its local bottleneck facilities.[50]

2. Protocol Processing.

20. After reexamining the classification of protocol processing services as enhanced in the *Reconsideration Order*, we affirmed the *Final Decision's* conclusion that code and protocol conversion should be classified as enhanced services. We emphasized that this classification was not intended to restrict carriers from using protocol conversion within their networks for purposes such as multiplexing, security, and network traffic management.[51] However, we concluded that protocol conversion external to a carrier's network could be obtained from an increasing number of alternative non-carrier sources and, accordingly, such conversion should not be offered as a basic service.[52]

21. We revisited the protocol processing issue in our 1983 *Protocols Order*.[53] In that *Order*, we reaffirmed our conclusion that protocol processing generally should remain an enhanced service, clarified the application of the definition, and expressed a willingness to entertain waiver requests to mitigate what we and many in the industry were beginning to perceive were some of the undesirable consequences of our treatment of protocol conversion. First, we specifically noted that a basic switched service can include protocol processing for the initiation, routing, and termination of calls or data packets. Such protocol processing functions inherent in call processing may be associated with either basic or enhanced service.[54] Second, we acknowledged that literal applica-

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[48] *Id.* at 8, para. 22.

[49] *Id.* at 26, para. 85.

[50] *Id.* at 31, para. 103.

[51] *Reconsideration Order*, 84 FCC 2d at 60, para. 25.

[52] *Id.* at 60, para. 26.

[53] Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, *Memorandum Opinion, Order and Statement of Principles*, 95 FCC 2d 584 (1983) (*Protocols Order*).

[54] *Id.* at 591, para. 15.

tion of the enhanced service definition could undesirably limit the ability of carriers to introduce new technology. Accordingly, we held ourselves ready to act favorably and expeditiously on petitions for waiver of the *Computer II* rules to ensure that new technology to implement an existing service can be employed.[55]

22. Third, we indicated that waiver requests to offer "internetworking" protocol conversion[56] with basic services on an unseparated basis would be treated more favorably than requests for other types of protocol processing waivers.[57] We found that a waiver of structural separation for such internetworking operations would be sufficiently narrow that it would have only a minimal impact on the *Computer II* policies.

23. Fourth, we found that the appropriate regulatory treatment is less clear for other forms of protocol conversion that carriers might seek to associate with basic service. We decided to address such questions through *ad hoc* proceedings in which parties would request waivers of the structural separation requirements. To govern the waiver process, we established a set of general principles designed to minimize regulatory uncertainty. We stated that we would grant waiver requests only on the condition that "underlying transparent transmission facilities, which are comparable in price, quality and conditions of service to that built into the offering to be associated with protocols conversion, remain available generally and unencumbered by protocol conversion."[58] We adopted this principle to ensure that if a carrier were to integrate a protocol conversion service with its basic services, it would not limit the availability of underlying basic services to others. We also stated our intention to focus with particularity on the services at issue in waiver requests. We sought to ensure that the requests would involve protocol processing alone, as defined in the first clause of section 64.702(a) of our rules,[59] and not information processing or subscriber interaction with stored information, as defined in the second and third clauses of section

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[55] *Id.* at 592, para. 17. For example, the structural separation requirements could apply, if read literally, to a basic transmission service in which, due to the introduction of newer digital technology, a caller using equipment that employs analog technology communicates through the basic network to a recipient using digital equipment.

[56] "Internetworking" protocol conversion is a specialized function that permits two packet switched networks, which may be operating at different transmission speeds and using different routing techniques, to interconnect efficiently.

[57] *Protocols Order*, 95 FCC 2d at 594, para. 22.

[58] *Id.* at 595, para. 24.

[59] 47 CFR § 64.702(a).

64.702(a).[60] Finally, we stated our willingness to act more favorably in considering waiver requests for those protocol processing services that materially improve the performance of the basic network if such improvement cannot be gained by using protocol processing outside the network.[61]

E. Modification of Final Judgment

24. In 1974, the United States Department of Justice (DOJ) filed an antitrust complaint against AT&T, alleging that AT&T had monopolized, or attempted to monopolize, a number of markets for telecommunications equipment and services in violation of Section 2 of the Sherman Act.[62] In 1982, AT&T and DOJ settled the complaint by agreeing to the entry of a consent decree, which, after some significant modifications were made, was adopted by the United States District Court for the District of Columbia as a Modification of Final Judgment (*MFJ*.[63] The *MFJ* required AT&T to divest itself of its wholly-owned operating companies, the BOCs, and most of the assets held by the BOCs. Pursuant to the *MFJ*, AT&T filed a Plan of Reorganization, which the Court also approved, that provided for this divestiture and the reorganization of the 22 BOCs into seven regional holding companies.[64] As a result of divestiture, which took place on January 1, 1984, AT&T no longer provides local exchange service and, in some states, intra-LATA[65] toll service. It does, however, continue in its other major lines of business. AT&T retained its CPE and enhanced services businesses as well as its research, manufacturing, and inter-LATA toll facilities. The BOCs, as owners of local exchange facilities, were prohibited from manufacturing CPE or providing inter-LATA transmission services and were subjected to general line-of-business restrictions that limit the service and products they may provide.

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[60] *Id.*

[61] *Protocols Order*, 95 FCC 2d at 595–96, para. 26.

[62] 15 USC § 2 (1984).

[63] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (*U.S. v. AT&T or MFJ*).

[64] *See* AT&T Plan of Reorganization (filed December 16, 1982), approved in *United States v. Western Electric Co.*, 569 F. Supp. 990, 993 n. 9 (D.D.C.), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983). In this *Order* we refer to the seven regional holding companies as BOCs.

[65] "LATA" stands for Local Access Transport Area, a term that describes the geographical areas, created by the AT&T Plan of Reorganization, in which the BOCs provide service. *Id.*

25. The *MFJ* treated AT&T and the BOCs in different ways with regard to the provision of "information services", which it defined as follows:

> The offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service.[66]

With respect to AT&T, the *MFJ* considered two general classes of information services: 1) "electronic publishing," in which AT&T would control the content of transmitted information, and 2) data processing and other computer-related services, which would involve no AT&T control of content other than for transmission purposes.[67] The *MFJ* prohibited AT&T from engaging in electronic publishing for a period of seven years from the date of entry of the decree. The Court concluded that such a restriction is necessary to avoid potential dangers to competition and First Amendment values.[68] However, the *MFJ* formally freed AT&T from the general restrictions on its provision of data processing and other computer-related services imposed by the *1956 Decree*,[69] since the Court found that AT&T's unrestricted entry into such markets would likely "benefit the American consumer, American foreign trade, and national defense".[70]

26. However, the *MFJ* prohibited the BOCs from providing any information services. The Court found that such a prohibition would not only guard against potential discrimination and cross-subsidization, but also would motivate the BOCs to design their local networks to accommodate the maximum number of information service providers. According to the Court, if the BOCs were permitted to provide information services, they would have incentives to design the local networks to discourage competition,[71] but with the prohibition in place, their incentives to increase their earnings from network access fees will lead them to implement network designs that encourage competitive entry into information services.

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[66] *MFJ*, 552 F. Supp. at 229, para. IV. J.

[67] *Id.* at 179.

[68] *Id.* at 183-86, 225.

[69] *See supra* note 20.

[70] *U.S. v. AT&T*, 552 F. Supp. at 180.

[71] *Id.* at 188-89.

F. BOC Separation Order.

27. In approving the *MFJM*, the divestiture court concluded that the decision whether to apply structural separation requirements to the BOCs' provision of CPE, enhanced services, or other unregulated operations was best left to legislators and state and federal regulators.[72] Immediately before divestiture occurred, we considered the issue of structural separation for the divested BOCs. In the *BOC Separation Order*, we concluded that they should be required to provide CPE, enhanced services, and cellular services subject to a form of structural separation.[73]

28. While our principal focus in the *BOC Separation Order* was on CPE operations, we did consider various issues raised by the possibility that the BOCs would be participating in the enhanced services marketplace. We noted that despite the divestiture court's apparent conclusion that the BOCs could not provide enhanced services because of the prohibitions in the *MFJ* on their offerings of "information services", both the BOCs and DOJ contended that there are some enhanced services that the BOCs may offer. We found it unnecessary to resolve this definitional question in the *BOC Separation Order* because the BOCs had not announced which enhanced services, if any, they would offer after divestiture.[74] We expressly assumed that the BOCs could offer some enhanced services and applied the structural separation requirements to those services.

29. In deciding to apply structural separation to the BOCs, the chief question we addressed was whether they possessed the potential to cross-subsidize and discriminate, and, if so, whether nonstructural safeguards alone would provide adequate protection[75] We agreed with the BOCs' contentions that their lack of manufacturing and interexchange facilities, as well as state regulators' detailed review of the costs included in prices for regulated services, reduced their opportunities for cross-subsidization. However, we concluded that these factors did not eliminate such opportunities, and that structural separation provided greater benefits, in the form of more protection against improper cost-shifting, than accounting safeguards alone could

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[72] *Id.* at 180 n. 203, 193 n. 251. In a later decision, the divestiture court adopted a "separate subsidiary" requirement as a condition to granting waivers of the restrictions in the *MFJ* on permissable lines of business for the BOCs. *See United States v. Western Electric Company*, 592 F. Supp. 846, 870-71 (D.D.C. 1984).

[73] *BOC Separation Order*, 95 FCC 2d at 1120, para. 3.

[74] *Id.* at 1127, para. 22.

[75] *Id.* at 1129, para. 25, 1135-37, paras. 45-51.

provide.[76] We further concluded that the potential for improper discrimination was significant enough to require some form of structural separation.[77] We found that structural separation would alleviate concerns about potential BOC anticompetitive practices in enhanced services markets by requiring the BOCs to enter such markets, if at all, on the same terms and conditions as other suppliers.[78]

30. We examined the BOCs' CPE operations in particular and concluded that the costs of structural separation were not substantial. We could find few economies from the joint provision of CPE and basic services, due to their "inherently separate nature,"[79] and determined that there was no reason to believe that significant costs would be incurred in requiring separate CPE marketing personnel. We concluded that for the BOCs, the costs of requiring structural separation were outweighed by the benefits. However, we also indicated that, "we intend to review the appropriateness of the separation conditions within two years following the BOCs' compliance with [those conditions] . . . in light of prevailing circumstances."[80]

31. In the *BOC Separation Order*, we decided not to apply the full panoply of structural separation requirements originally imposed on AT&T in *Computer II*, and instead determined that allowing the BOCs to engage in some joint operations was in the public interest. The permissible joint operations specifically involved BOC CPE operations, rather than enhanced services.[81] We also permitted the BOCs to demonstrate that some organizational structure other than a separate subsidiary, such as a separate unincorporated division, would fulfill the structural separation goals.[82]

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[76] *Id.* at 1131, para. 32.

[77] *Id.* at 1134-35, para. 44.

[78] *Id.* at 1135, para. 47.

[79] *Id.* at 1138, para. 54.

[80] *Id.* at 1140, para. 61.

[81] *See id.* at 1139-50, paras. 60-79. We permitted the BOCs to engage in: (1) joint billing for CPE for four years following divestiture; (2) referral of dial-tone customers to the CPE separate subsidiary, provided that such customers are informed that alternative CPE vendors exist; (3) joint installation and maintenance for residential and single-line business telephones; and (4) sharing of administrative services.

[82] We have subsequently permitted the BOCs to engage in additional joint CPE/basic services operations. In the *Sales Agency Order*, we permitted the BOCs' separate affiliates to act as sales agents on a commission basis for intrastate basic services offered by their operating companies. In the Matter of American Information Technologies Corp., BellSouth, and NYNEX, Interim Capitalization Plans for the Furnishing of Customer Premises Equipment and Enhanced Services, *Memorandum Opinion and Order*, ENF File No. 84-10, 98

32. In the *BOC Separation Reconsideration*, we addressed petitions asking that we reconsider the policies adopted in the *BOC Separation Order*. We affirmed the application of the structural separation requirements to the BOCs, stating that "[w]hile [nonstructural safeguards] may, at some time in the future, prove adequate to protect the public interest, the structural separation conditions are necessary at this time."[83] We also affirmed, with minor clarifications, the modifications to the structural separation requirements that apply to the BOCs.

G. Protocol Conversion Waivers.

33. As a result of our decision to apply the structural separation requirements to the post-divestiture BOCs' enhanced service offerings, they could not integrate protocol conversion with their basic services unless they obtained waivers from our rules pursuant to the guidelines established in the *Protocols Order*. Several BOCs filed petitions asking us for permission to provide various forms of protocol conversion within their basic networks. In November 1984, we considered the merits of BOC requests to provide an X.25/X.75[84] internetworking protocol conversion interface without structural separation. We granted these requests[85] and treated this interface as one that is to be offered under tariff in conjunction with the associated basic services. We acknowl-

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FCC 2d 943 (1984), *modified on reconsideration*, FCC 85-582 (released Nov. 11, 1985) (*Sales Agency Reconsideration*). The Common Carrier Bureau has also granted several waivers of the joint marketing restrictions applied to the BOCs. For example, the Bureau granted a waiver to the Bell Atlantic Telephone Companies permitting them to provide Centrex service and associated CPE on a single-source, prime-contractor basis in response to customer requests for proposals for telecommunications systems, provided the subcontractor for the CPE is an unaffiliated vendor. Bell Atlantic Telephone Companies, Emergency Petition for Limited Waiver of Section 64.702 of the Commission's Rules and Regulations to Permit Provision of Centrex Service and Associated Customer Premises Equipment on a Prime Contractor Basis, *Memorandum Opinion and Order*, File No. AAD-50002B, Mimeo No. 0358 (released Oct. 18, 1985) (*Bell Atlantic Centrex Waiver Order*).

[83] *BOC Separation Reconsideration* at para. 20.

[84] "X.25" and "X.75" refer to specific communications protocols designed to implement "packetized" digital data transmission. The X.25 protocol facilitates communication between packet-mode terminal equipment and a packet-switched data network. The X.75 protocol performs an internetworking function to ensure compatible communications between packet switched networks. *See Asynchronous/X.25 Waiver Order, infra* note 86, 100 FCC 2d at 1062-68, paras. 11-26.

[85] Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide Certain Types of Protocol Conversion with Their Basic Network, *Memorandum Opinion and Order*, FCC 84-561 (released November 28, 1984) (*X.25/X.75 Waiver Order*).

edged that the interface would have been used internally in the Bell System network prior to divestiture and, accordingly, would have been an element of basic service at the time that we defined basic service in *Computer II*.

34. Subsequently, in the *Asynchronous/X.25 Waiver Order*,[86] we permitted several BOCs to provide asynchronous/X.25[87] protocol conversion from equipment collocated with their network facilities, as a component of basic, packet-switched, data transport services. We found that the public interest would be served both by the additional competition the BOCs would provide to existing providers of packet-switched services and by the real efficiencies that such collocation would permit in increased use of the public switched network and in elimination of duplicated facilities. Accordingly, we granted the BOCs permission to collocate facilities, subject to three express conditions. First, we required the BOCs to make available the competitors without discrimination the inter-office channels from which the BOCs construct their underlying packet-switched networks. Second, we required the BOCs to include in tariffs for their underlying packet-switched services an additional network utilization rate element (NURE) to be applied to any user of asynchronous/X.25 conversion, representing the cost, in decreased efficiency, to the underlying basic packet service caused by the integrated enhanced protocol conversion operations. Third, we required the BOCs to offer end-users access to the protocol conversion offerings of their competitors that is equal to that provided for the BOCs' own such offerings. As a corollary to this, the BOCs' protocol operations were required to take under tariff the intra-office connections by which they connect with their subscribers.[88]

35. By fulfilling the foregoing conditions, the BOCs would be permitted to install, maintain, and operate their asynchronous/X.25 conversion facilities and their packet-switched facilities in an integrated fashion. We also established additional conditions that the BOCs would be required to satisfy in order to market their protocol conversion services jointly with basic packet switching.[89]

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[86] Petition for Waiver of Section 64.702 of the Commission's Rules *Memorandum Opinion and Order*, FCC 85-101, 100 FCC 2d 1057 (1985) (*Asynchronous/X.25 Waiver Order*).

[87] "Asynchronous" protocols are generic means of encoding, packaging, and controlling digital signals that are widely used in data communications equipment. *See id.* at 1062-64, paras. 11-17.

[88] *Asynchronous/X.25 Waiver Order*, 100 FCC 2d at 1104-1112, paras. 118-135.

[89] We held that to obtain approval for joint marketing, a BOC must demonstrate: (1) how the costs of marketing asynchronous, format-compatible packet services by unseparated telephone company personnel will be identified and

H. AT&T Structural Relief Order and Related Proceedings.

36. At the same time the BOCs were actively pursuing waivers of structural separation for specific enhanced services, we were reexamining the applicability of our structural separation rules to AT&T's CPE offerings and a limited set of its enhanced services. Shortly after divestiture of the BOCs pursuant to the *MFJ*, AT&T filed a petition with us requesting permission to provide CPE and enhanced services free of the structural separation requirements of *Computer II*. After reviewing the petition and the comments filed by a number of parties, we instituted a rulemaking proceeding which ultimately resulted in our decision in the *AT&T Structural Relief Order*[90] to relieve AT&T of those requirements for its provision of CPE. In that *Order* we acknowledged the significant changes in the telecommunications industry that had occurred since the adoption of the *Final Decision*. We specifically noted that the divestiture of the BOCs pursuant to the *MFJ* not only significantly reduced the assets and revenues from those of the pre-divestiture Bell System, but removed AT&T's control over bottleneck local exchange networks. We also noted the significant decline in AT&T's share of the CPE market and the fact that it was faced with growing competition in its regulated offerings of basic, inter-LATA transmission services.[91] Based on these substantial changes in the telecommunications industry, as well as a reassessment of the relative efficacy of structural versus nonstructural safeguards, we found that the costs of continuing to require structural separation for AT&T's provision of CPE outweighed its benefits. Accordingly, we concluded that AT&T would no longer be subject to the structural separation requirements for its offerings of CPE. Instead, AT&T would be required to implement certain nonstructural safeguards to protect against the discrimination and cost-shifting concerns identified in *Computer II*. Specifically, we required AT&T to:

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excluded from "above-the-line" regulatory accounts; (2) what marketing information, if any, will be available (and on what basis) to other enhanced service vendors to give them an opportunity comparable to that of the BOCs' unseparated marketing personnel to vend asynchronous-compatible packet switched services to the BOCs' basic service subscribers; and (3) how the petitioner's marketing proposals related to the second and third conditions discussed *supra* para. 35. *Id.* at 1104, para. 116.

[90] Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Co., *Order*. CC Docket No. 85-26, 102 FCC 2d 655 (1985).

[91] Such competition could reduce AT&T's ability to improperly shift costs from its unregulated to its regulated operations by making it more difficult for it to price its basic transmission services above cost.

(1) adhere to a modified version of the existing network disclosure rules; (2) not discriminate in favor of its CPE customers in providing network services; (3) not disclose CPNI of any AT&T-C customer to AT&T CPE personnel if the customer so requests; and (4) establish accounting procedures for the proper allocation of joint and common costs between AT&T's regulated and unregulated activities.

37. The *AT&T Structural Relief Order* did not address the unseparated provision of AT&T's enhanced services. Soon after our adoption of that *Order*, AT&T requested a temporary waiver of the structural separation requirements, under conditions similar to those set forth in the *AT&T Structural Relief Order*, for a limited class of enhanced services provided by AT&T-IS, its separate subsidiary. AT&T-IS provided these services from facilities that were not part of AT&T's basic network facilities and were not collocated with such facilities. Furthermore, these services utilized AT&T basic facilities that AT&T-IS obtained under tariff, like any other enhanced service provider.

38. On November 27, 1985, the Chief, Common Carrier Bureau (the Bureau) acting on delegated authority, released the *AT&T Limited Waiver Order*,[92] granting AT&T temporary relief from the structural separation requirements for a limited class of enhanced services pending the outcome of this proceeding.[93] AT&T was granted a temporary waiver only for those enhanced services (the Waived Services) utilizing computer processing facilities that are not collocated with AT&T basic service network facilities and that interconnect with those network facilities only through interfaces available to other enhanced service providers under tariff. This relief was subject to a set of conditions, including nonstructural safeguards similar to those of the *AT&T Structural Relief Order*.[94]

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[92] Petition of AT&T for Limited and Temporary Waiver of 47 CFR Section 64.702 Regarding Its Provision of Unregulated Services Externally to the AT&T-C Network, *Memorandum Opinion and Order*, Mimeo No. 1147 (released November 27, 1985).

[93] *AT&T Limited Waiver Order* at para. 3.

[94] AT&T must provide the Waived Services through a corporate entity other than AT&T-C, and that corporation must obtain under tariff any AT&T basic services offered as part of the Waived Services. In addition, AT&T must (i) adhere to the network disclosure rules set forth in the *AT&T Structural Relief Order*; (ii) refrain from discriminating in favor of its Waived Services operations or customers of those services in providing basic services, and file periodic reports to substantiate that nondiscrimination; (iii) observe the restrictions on disclosure of any AT&T-C customer's CPNI set out in the *AT&T Structural Relief Order*; and (iv) follow the procedures set forth in its accounting plan filed pursuant to the *AT&T Structural Relief Order* to identify and allocate joint and common cost between regulated and unregulated activities for its combined

The *AT&T Limited Waiver Order* found the Waived Services to be functionally equivalent to CPE for regulatory purposes. Accordingly, nonstructural safeguards, analogous to those of the *AT&T Structural Relief Order* for CPE, were found to be effective against potential anticompetitive actions by AT&T in providing such services. By applying the analysis of the *AT&T Structural Relief Order* to the Waived Services, AT&T was found to have fulfilled our requirements for temporary waiver of the *Computer II* rules.[95]

I. BOC Structural Relief Notice.

39. In March of this year, in response to petitions from a number of BOCs,[96] we adopted the *BOC Structural Relief Notice*, initiating a rulemaking to determine whether the BOCs should continue to be required to provide CPE subject to the structural separation rules. In that *Notice*, based on our tentative conclusion that the relative costs of structural separation for BOC CPE operations now exceed the benefits when compared with available forms of nonstructural regulation, we proposed to relieve the BOCs of the structural separation requirements for their provision of CPE and replace those requirements with certain nonstructural safeguards patterned after (but not identical to) those established in the *AT&T Structural Relief Order*. In the *BOC Structural Relief Notice*,[97] we also expressed the concern that, despite our decision to remove structural separation requirements from BOC CPE offerings, some states might seek to reimpose such requirements based on their own regulatory authority. We proposed to preempt such state authority in order to permit the BOCs, consumers, and ratepayers to enjoy the benefits that the removal of structural separation could provide.

40. Finally, in that Notice, we decided to consider the competitive problems presented by the provision of CPE by all providers of regulated exchange telecommunications services other than the BOCs — *i.e.*, the Independents. We concluded that a fundamental

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network services, CPE, and Waived Services activities. *Id.* at para. 4.

[95] Id. at paras. 27, 29-31.

[96] Petition of BellSouth Corporation and the Ameritech Operating Companies for Expedited Relief from and Limited Waiver of Computer II Structural Separation Requirements (filed Nov. 7, 1985); Supplemental Data of Ameritech Operating Companies (filed Nov. 12, 1985); Petition of Bell Atlantic Telephone Companies for Rulemaking to Permit the BOCs to Provide CPE without Structural Separation (filed Nov. 15, 1985); Petition of Southwestern Bell Corporation for Expedited Relief from and Limited Waiver of Computer II Structural Separation Requirements (filed Nov. 20, 1985).

[97] *See supra* note 16.

precept of regulation is that similarly situated entities should be treated in a similar manner. Therefore, we decided to develop an appropriate regulatory framework for the provision of CPE by the Independents in light of our proposals for BOC CPE operations. First, we tentatively concluded that, since the Independents as a group appear no more likely, and in many cases substantially less likely, than the BOCs to engage in anticompetitive conduct with respect to their CPE activities, they should be subject to no more onerous forms of regulation than those imposed on the BOCs. Accordingly, in light of the proposal to eliminate all structural separation for the BOCs' CPE activities, we proposed the continued exemption of the Independents from our structural separation requirements and the preemption of state-imposed structural separation on them. Second, we proposed that to the extent we find that provision of CPE by at least some Independents presents competitive concerns similar to those implicated by the BOCs' provision of CPE, the nonstructural safeguards applicable to the BOCs should also be applied to those carriers.

J. The Notice.

41. In light of our experience in applying and enforcing the *Computer II* requirements, we adopted the *Notice* in this docket to undertake a broad reexamination of the regulatory framework promulgated in *Computer II* and developed and modified over the past several years.[98]

42. In the *Notice*, we recognized that the current telecommunications industry is radically different from the industry in existence at the time of *Computer II*.[99] Most obviously, pursuant to the AT&T divestiture and the terms of the *MFJ*, the unified Bell System has been replaced with a set of companies that increasingly seek to compete with each other. In addition, we specifically noted the increased competitive presence of the IBM Corporation in various sectors of the telecommunications industry through its ownership interests in MCI Corporation (an interexchange carrier) and Rolm Corporation (a CPE and telecommunications equipment manufacturer). Based on these findings, we decided to reexamine the *Computer II* regulatory framework. Specifically, we tentatively found that the costs of the structural separation requirement for enhanced services now outweigh its benefits. In this regard, we noted that AT&T now lacks local

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[98] *Notice* at para. 22.

[99] *Id.* at para. 18.

"bottleneck" facilities, the ownership of which was one of the principal bases for the imposition of structural safeguards in *Computer II*. Moreover, we tentatively concluded that regulatory protections short of structural separation can adequately control the BOCs' potential anticompetitive use of their local exchange networks in enhanced services markets.[100]

43. Also motivating this reexamination of the *Computer II* regulatory framework was our realization that, since adoption of that framework in 1980, we have frequently been called upon to clarify, interpret, and apply the "enhanced services" definition, particularly for specific services that carriers seek to offer on a regulated basis. These services, such as protocol conversion, generally serve to improve the ability of network users to communicate, but the enhanced service definition brings into question whether such services can be offered on a regulated basis.[101] In addition, in the *Notice* we tentatively concluded that the *Computer II* structural separation requirements have denied the public the benefits of enhanced services that cannot be efficiently offered unless they are integrated into the basic network. In the *Notice*, we cited protocol conversion, VMS services, and innovative routing and switching functions as services in which the structural separation requirements preclude such integration efficiencies for AT&T and the BOCs.[102] We also stated that the definition of enhanced services is ambiguous, particularly with regard to protocol processing-type functions.[103]

44. In the *Notice*, we invited comment on these tentative findings and conclusions, and we requested information and comment on a large number of related issues and a variety of proposals from new regulatory approaches. In Part II of the *Notice*, we proposed a general plan to key the extent of our regulation to the economic characteristics of both the service provider and the market for that service. We also requested information on numerous specific topics related to the implementation of that framework. We proposed a more evolutionary approach in Part III of the *Notice*. The Part III approach would seek to improve enhanced services regulation by replacing structural separation with nonstructural safeguards, and by modifying

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[100] *Id.* at para. 19.

[101] *Id.* at paras. 4, 5.

[102] *Id.* at paras. 6–9.

[103] For example, we noted that a change in data transmission speed would appear to be enhanced under the first clause of the definition, yet we ruled in the *Protocols Order* that such a speed change, if provided within the network, is a basic service. *Protocols Order*, 95 FCC 2d at 601 n. 5.

the existing enhanced services definition, for protocol processing services. We proposed several alternatives within this evolutionary approach to eliminate certain current difficulties with the definition of enhanced services. Part IV of the *Notice* requested comment on the concepts of CEI and collocation as means to ensure that if carriers are permitted to offer enhanced and basic services in an integrated fashion, competitors may receive comparable interconnection opportunities in utilizing basic services facilities for their enhanced service offerings. We also requested comment on a related set of issues involving Integrated Services Digital Networks (ISDN). Part V of the *Notice* reopened for comment the issue of whether we should permit VMS services to be integrated with basic network services to promote the availability of VMS services to the public. Finally, Part VI of the *Notice* considered whether, and in what manner, NCTE should be available from carriers on an unseparated basis. This is the sole CPE issue raised in the *Notice*.[104]

45. In response to the *Notice*, we received comments from 99 parties, reply comments from 77 parties,[105] and many informal comments and letters.[106] While the range of issues presented in the *Notice* was broad, some commenters, nevertheless, discussed topics, such as modification of Title II regulation for some basic services, the proper scope of the *MFJ*, depreciation policies for basic facilities, and Commission regulation of so-called "electronic publishing", that the *Notice* did not specifically address. We do not consider such issues in this *Order*. While the subject matter of these issues may be generally related to the topics addressed in the *Notice*, we do not consider them to be sufficiently within the scope of this proceeding for appropriate resolution in this *Order*.

III. ELIMINATION OF STRUCTURAL SEPARATION FOR THE ENHANCED SERVICE OPERATIONS OF AT&T AND THE BELL OPERATING COMPANIES

46. We first address the fundamental issue of whether we

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[104] *See Notice* at para. 40 n. 25.

[105] *See* Appendix A, attached hereto, for a complete list of comments received. In the balance of this *Order*, we will utilize the abbreviations for commenters that appear in that Appendix.

[106] Vermont, United Cable, EMA and United Telephone filed late comments, and McCaw and North Dakota filed late replies. Each of these parties submitted a Motion to Accept Late Filed Comments, and no party opposed these motions. Since we find that no party would be prejudiced by our granting these motions, we grant them and accept these late filed comments and replies. We treat as informal comments those comments and replies that were filed late and not accompanied by a proper motion.

should eliminate the structural separation requirements for the enhanced service operations of AT&T and the BOCs. We conclude that the record strongly supports a finding that the inefficiencies and other costs to the public associated with structural separation significantly outweigh the corresponding benefits.[107] Accordingly, we remove these requirements from AT&T and the BOCs, subject to their compliance with the requirements for CEI and other nonstructural safeguards established in subsequent sections of this *Order*.[108]

A. Positions of the Parties.

47. Commenters address the structural separation issues in a variety of ways, ranging from general discussions of the utility of structural separation as a regulatory tool to very specific arguments on the costs and benefits of its application to AT&T and the BOCs. To most concisely present the positions of the commenting parties, we will summarize their comments for and against removal of the structural separation requirements in separate sections. Within each such section we will present (a) the positions of the commenters on the overall effects of the structural separation requirements on the enhanced services marketplace, and then the specific arguments directed to the continued applicability of those requirements to (b) AT&T and (c) the BOCs.

1. Comments Supporting the Removal of Structural Separation for AT&T and the BOCs.

a. General

48. Parties supporting the removal of the structural separation requirements for the provision of enhanced services by AT&T and BOCs argue that, in the current telecommunications environment,

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[107] Cellular radio providers such as Ameritech Mobile, Bell Atlantic Mobile, McCaw, and others argue that because the *Notice* centered on the relief of structural separation for enhanced services, the results of this proceeding should not apply to our policies and regulations governing cellular carriers, particularly the structural separation requirements for BOC provision of cellular services that are codified in Section 22.901 of our Rules. *See* 47 CFR § 22.901 (1985). We agree. The policies we adopt in this *Order* with respect to enhanced services do not in any way affect or modify our existing cellular policies and regulations, including the cellular structural separation requirements of Section 22.901, which were developed from extensive records in proceedings that addressed specific issues of concern in the cellular communications marketplace.

[108] *See infra* paras. 111-265.

the costs of those requirements outweigh their benefits. On the cost side of the equation, they contend that structural separation has imposed substantially greater burdens on the affected carriers, and ultimately on the public, than anticipated when we established those requirements in *Computer II*. In particular, a large number of parties assert that structural separation has deprived the public of innovative services that could be provided efficiently through AT&T's and the BOCs' extensive communications networks and thus made available to a large number of potential customers. For example, Northern Telecom and others argue that residential and small business customers currently have limited access to advanced "Information Age" services, which are now available to large customers. They contend that such customers would benefit from new services at reasonable rates if AT&T and the BOCs were permitted to integrate basic and enhanced service capabilities.[109] They note that while our Order denying AT&T's *Computer II* waiver petition for Custom Calling II found that other suppliers would supply similar, network-based VMS services to the public, such services have not been forthcoming. These commenters contend that although VMS-type services are available for large businesses and specialized customers, the existing offerings do not serve small business and residential users as well as VMS offerings integrated into the network could.[110] Moreover, commenters claim that if integrated enhanced services were readily available to the mass residential and small business markets, demand for such services would greatly increase, spurring further service innovation. In addition, they assert that the widespread availability of such services would improve the competitive posture of the small businesses that use them, thus aiding the economy as a whole.[111]

49. Southwestern Bell predicts the reversal of the recent trend toward distributed computer processing applications, such as personal computers, PBXs, and "smart" telephones, and argues that the most significant advances in low-cost computation will occur in larger, centralized computers that utilize Very Large Scale Integration (VLSI) technology. Accordingly, it contends that the Commission should eliminate structural separation without delay to permit such technology to develop.[112]

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[109] *See, e.g.*, Northern Telecom Comments at 5; NYNEX Reply Comments at 9.
[110] *See, e.g.*, Ameritech Comments at 61; NTIA Comments at 14-15.
[111] *See, e.g.*, Southwestern Bell Reply Comments at 8-9.
[112] Southwestern Bell Comments at 29-30.

50. Supporters of structural relief also claim that even when we granted waivers of the *Computer II* rules to permit carriers to provide enhanced services integrated with their basic network facilities, the waiver process itself was unnecessarily complex and often substantially delayed the introduction of new services. They argue that the waiver process creates significant new uncertainties for corporate planners and imposes transaction costs on carriers associated with developing contingency plans, obtaining the waivers themselves, and coordinating with the services customers.[113] Moreover, some commenters state that structural separation has reduced innovation and stifled the introduction of efficient new services by interjecting unnecessary regulatory restraints into the product development process. Some of these commenters argue that such limits on innovation are a natural result of structural separation because information flows within the affected carriers are restricted and the technical design of many potential services is never pursued.[114]

51. Similarly, a number of user groups support the removal of structural separation requirements for the enhanced service offerings of AT&T and the BOCs. For example, FEA argues that the *Computer II* waiver process has distorted competition by providing potential competitors of AT&T and the BOCs with opportunities to delay these carriers' attempts to introduce innovative, integrated services to the public.[115] Other user groups contend that structural separation imposes substantial costs in duplicated facilities, personnel, and overhead that are passed on to consumers.[116] Supporters of structural relief also contend that customers now demand end-to-end integrated systems solutions to their computer-processing and telecommunications needs,[117] which AT&T and the BOCs cannot provide under the *Computer II* rules. In contrast, they note that IBM, through its ownership of Rolm and affiliation with MCI, and GTE, which is not subject to the *Computer II* structural separation requirements,[118] can offer such

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[113] *See* Ameritech Comments at A-2 to A-7.

[114] *See, e.g.*, ADCU Comments at 4-5; API Comments at 7.

[115] *See, e.g.*, FEA Comments at 3-4.

[116] *See, e.g.*, API Reply Comments at 8; NTIA Comments at 2.

[117] *See, e.g.*, BellSouth Comments at 17-20.

[118] However, GTE's Sprint subsidiary, an interexchange carrier, is subject to the terms of a consent decree that imposes a form of structural separation similar to that of *Computer II*. *See United States v. GTE Corp.*, 603 F. Supp. 730 (D.D.C. 1984).

one-stop solutions through integrated marketing forces.

52. A theme frequently expressed by supporters of structural relief for AT&T and the BOCs is that the telecommunications industry has changed so radically since we adopted the *Computer II* rules that the benefits we anticipated from the structural requirements are now negligible. For example, DOJ claims that the industry characteristics that prompted the structural separation policy — a unified Bell System with a national presence, control of local facilities, and extensive horizontal and vertical integration, — no longer exist.[119] Instead, the pre-divestiture AT&T has been replaced by eight separate companies, none of which possess all the characteristics we identified in *Computer II* as supporting the imposition of structural separation. DOJ further argues that because of divestiture and the growth of competition since the adoption of the *Computer II* rules, competition is driving prices to cost even for the regulated services of AT&T and the BOCs and is lessening the potential for cross-subsidization.[120] These parties also contend that to the extent any anticompetitive potential exists, nonstructural safeguards, such as accounting, nondiscrimination, and "Comparably Efficient Interconnection", are more than adequate to control it. IBM, for example, believes that the inefficiencies of the *Computer II* regulatory framework discussed in the *Notice* can be eliminated by replacing structural separation with effective nonstructural safeguards. Even though such nonstructural safeguards themselves involve costs, IBM contends that their public benefits justify their adoption.[121] Moreover, USTA and others observe that the Commission has relied on accounting safeguards, rather than structural separation, for the provision of enhanced services and CPE by all carriers other than AT&T and the BOCs, and claims that problems have not arisen.[122] These commenters argue that the Commission and the industry have gained valuable experience from the substitution of nonstructural safeguards for structural requirements in the *Asynchronous/X.25 Waiver Or-*

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[119] *See, e.g.*, DOJ Reply Comments at 16–17; AT&T Comments at 3–11; Ameritech Comments at 6–7; BellSouth Comments at 13–14, App. B.

[120] *See, e.g.*, BellSouth Comments at 13.

[121] IBM Comments at 19–20; *see also*, DEC Comments at 3–4; California Comments at 2; AAR Comments at 3–5; API Comments at 10; DOJ Reply Comments at 16.

[122] USTA Comments at 35; *see also* AT&T Reply Comments at 16–18; Taconic *et al.* Comments at 13.

der[123] and the *AT&T Structural Relief Order.*[124]

b. AT&T

53. AT&T, specifically addressing the application of structural separation to its enhanced services operations, contends that the factors that caused us to remove structural separation for its CPE operations also apply to its provision of enhanced services. It argues that because of divestiture, it no longer controls local "bottleneck" facilities, which it asserts was the key factor in the Commission's original decision to impose structural separation on the pre-divestiture Bell System. It also claims that it has no significant ability to cross-subsidize because it lacks market power and regulated resources to subsidize its unregulated offerings. It notes that nearly 60 percent of its regulated revenues are paid directly to local exchange carriers pursuant to our access charge rules. In addition, it claims that competition in the interexchange market is an effective check on its ability and incentives to engage in improper cost-shifting or discriminatory provision of basic services, since such activities would only provide opportunities for its interexchange competitors. AT&T also agrees with other parties[125] that nonstructural safeguards, such as those adopted for its provision of CPE in the *AT&T Structural Relief Order*, can effectively address any residual competitive concerns that we may have about its unseparated provision of enhanced services. Furthermore, because divestiture substantially decreased its size and resources, AT&T argues that it is less able to bear the costs of maintaining a separate subsidiary.

54. AT&T also argues that, as with CPE, the marketplace for enhanced services is truly competitive and includes as vendors such large, well-financed firms as General Electric, IBM, McDonnell Douglas, and Xerox. AT&T claims that it is a new, late entrant into this marketplace, and that as a consequence, its position is weaker here than in CPE markets where it notes we have already found that it no longer occupies a position of dominance. In support of its claim to nondominant status with respect to enhanced services, AT&T estimates that its 1985 revenues from enhanced services are less than one-third of one percent of the industry total.

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[123] *See supra* note 86.

[124] *See supra* note 16.

[125] *See supra* para. 52.

55. AT&T finally argues that, although structural separation no longer provides the public with substantial benefits, it continues to impose significant costs by limiting consumer choice and the availability of efficient services. AT&T contends that because of the structural separation requirements it has been prevented from providing certain offerings, such as efficient check-clearing and credit card authorization services, that are not currently available in the marketplace. AT&T criticizes the uncertainty caused by structural separation and indicates that many services may never be provided to the public if it is not permitted to integrate its activities.

c. *The BOCs*

56. The BOCs, in advocating the elimination of structural separation for their enhanced service operations, employ many of the same arguments articulated by AT&T. Their primary argument is that, because of changes in the structure of the telecommunications industry, they no longer have the ability or the incentives to engage in cross-subsidization or discrimination. BellSouth argues that standards organizations, such as the T1 Committee,[126] have taken the lead in developing network standards, thus substantially limiting the BOCs' ability to uniformly set network standards. Several BOCs further argue that their local exchange facilities are no longer economic "bottlenecks" that can be used as sources of revenue for cross-subsidization. They contend that, to the extent that they may have some market power with respect to the services they provide to residential and small business customers, they are unable to use such market power to create a revenue source for cross-subsidies because state regulatory policies generally require that those services be priced significantly below cost. The BOCs also assert that the possibility of large business customers bypassing their local switches will prevent them from using revenues from those sources for cross-subsidy, and they note that alternative technologies, such as shared tenant services and cable services, increasingly compete for their small- and medium-sized business customers. Indeed, some of the commenting BOCs view relief from structural separation as an aid to promoting universal service by motivating businesses to refrain from bypassing the local exchanges. In addition, the BOCs state

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[126] The T1 Committee is a private standards organization sponsored by ECSA and accredited by the American National Standards Institute. The Committee includes representatives of carriers, enhanced service providers, and manufacturers.

that they are increasingly subject to competition in intraLATA toll services from, among others, AT&T, IBM/MCI, and GTE Sprint, thus eliminating these services as a potential source of cross-subsidy.

57. The BOCs further argue that they do not have substantial market power in the key markets for "one-stop" integrated computer and communications services. They emphasize that GTE can offer integrated packages of local service, enhanced services, and CPE through one entity and can also offer interexchange service through its affiliated long distance carrier. They note that IBM can provide "one-stop" shopping for integrated services through its own computer and enhanced services business, its Rolm subsidiary, and its affiliation with MCI; and they assert that AT&T can do the same, despite the structural separation requirement for enhanced services, as a result of the *AT&T Structural Relief Order* and the *AT&T Limited Waiver*. The BOCs argue that both IBM and AT&T are larger than any BOC and have substantially more market power because of their integrated organizations. Accordingly, the BOCs assert that the structural separation requirements impose high costs on them and on society by impairing their ability to compete in such markets.

58. The BOCs argue strongly that any form of structural separation, such as a separate marketing requirement, would handicap their ability to compete. Moreover, the BOCs assert that we have recognized nonstructural safeguards to be effective in limiting carriers' potential for improper cost-shifting or discrimination, as evidenced in our structural relief for AT&T's CPE operations, as well as our longstanding regulatory policies for GTE. Thus, they contend it would be proper for the Commission to remove the structural separation requirements for the provision of enhanced services by the BOCs and replace those requirements with appropriate nonstructural safeguards.

2. *Comments Opposing the Removal of Structural Separation for AT&T and the BOCs*

a. General

59. Those commenters opposed to removing the structural separation requirements from the enhanced services operations of AT&T and the BOCs argue that these requirements have produced significant benefits, and will continue to do so, by spawning innovation and promoting competitive markets for enhanced

services. ADAPSO and others argue that the *Computer II* rules ensure that all enhanced service providers, including the enhanced service subsidiaries of AT&T and the BOCs, have nondiscriminatory access to the network and to technical and other information about the network. Indeed, ADAPSO argues that structural separation has induced AT&T and the BOCs to open their networks to accommodate competitive service providers.[127]

60. Moreover, vendors of various enhanced services oppose the removal of the structural separation requirements arguing that the market power of AT&T and the BOCs creates competitive dangers that nonstructural safeguards cannot eliminate.[128] Alarm service providers and mass calling service providers assert that they are particularly vulnerable to such dangers because they depend on the BOCs' local exchange facilities as an integral part of their services. Furthermore, VMS and telephone answering service providers strongly disagree with the *Notice's* statement that the public has been deprived of VMS services.[129] They stress that PBXs, personal answering machines, telephone answering service bureaus, and specialized equipment are all competitive substitutes for Custom Calling II-type VMS services.[130] Nearly all of these competitive vendors claim that the market power of AT&T and the BOCs is so great that their entry into these markets would seriously disrupt competition and threaten the viability of small competitors.

61. Commenters opposed to structural relief also contend that, despite divestiture and other changes in the industry since the *Final Decision* in 1980, the BOCs and AT&T continue to possess substantial market power. Accordingly, such commenters argue, these carriers have the same incentives and potential for anticompetitive behavior they had when the separate subsidiary requirements were first imposed.[131] Such commenters then conclude that, because the fundamental regulatory concerns that prompted structural separation still exist, the *Computer II* regulatory regime should remain intact.

62. Opponents of structural relief further argue that the *Computer II* rules and the consequent waiver proceedings promote regulatory certainty because they have developed in a cohesive manner over several years. MCI asserts that "uncertainty" only

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[127] ADAPSO Reply Comments at 28-29; *see also* GTE Comments at 10-11, 54-58, Attachments A and B; MCI Comments at 12.

[128] *See, e.g.*, CSEPA/NBFAA Reply Comments at 4-10; ADTC Comments at 2-3.

[129] *Notice* at paras. 134-35.

[130] *See, e.g.*, GTE Comments, Attachment B, for a list of VMS suppliers.

[131] *See, e.g.*, IDCMA Reply Comments at 2-16; *see infra* at paras. 65-71.

arises because of attempts by AT&T and the BOCs to circumvent the rules and integrate basic and enhanced facilities to obtain an unfair competitive edge.[132] In addition, a number of commenters argue that structural separation is the only workable, proven way to protect regulated ratepayers against cross-subsidization and enhanced service competitors against discrimination. In contrast, they argue, nonstructural safeguards are presently undefined and would be ineffective compared to structural separation.[133] Some opponents of structural relief emphasize that nonstructural safeguards would be burdensome for the Commission to enforce and thus less effective than what they characterize as the self-executing structural separation rules.[134]

63. While emphasizing the benefits of structural separation, opponents of structural relief also argue that its costs have been exaggerated. ADAPSO and others argue that AT&T and the BOCs have failed to quantify either incurred costs or opportunity costs. NATA argues that the public has been deprived of desirable services, not because of the structural separation requirements, but because AT&T and the BOCs have failed to provide adequate basic interconnection arrangements for the wider use of competitive enhanced services.[135] Lee and others contend that AT&T and the BOCs have failed to demonstrate pervasive efficiencies in integrating any enhanced services other than protocol processing services.[136] Thus, they argue that the Commission should limit any structural relief to, at most, protocol processing services. Others argue that we should retain structural separation for all enhanced services, including protocol processing, and rely on waiver proceedings for relief in appropriate circumstances.

64. Some commenters that oppose relief from structural separation argue, in the alternative, that even if we were to permit AT&T and the BOCs to integrate their basic and enhanced service facilities, we should still require structural separation for marketing activities.[137] A prohibition on joint marketing, they argue, would reduce the potential for AT&T and the BOCs to shift

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[132] MCI Comments at 13 n. 18.

[133] *See, e.g.*, CCTU Comments at 7; Cellular Communications Comments at 28; CFA/TRAC Comments at 2, 4; Florida Comments at 5; ITT Comments at 19; Missouri Comments at 20–21; NATA Comments at 17, 20–21.

[134] *See, e.g.*, RCA Comments at 16; Missouri Comments at 27.

[135] NATA Comments at 37.

[136] *See* Lee Reply Comments at 20–24.

[137] *See, e.g.*, CBEMA Comments at 56–58; Comptel Comments at 18–19; Tymnet Reply Comments at 22–28.

marketing costs from unregulated to regulated activities. Moreover, they claim that this requirement would ensure that a separate enhanced services entity would exist, which could be charged tariffed rates for underlying basic services supplied by the carrier. In addition, they argue that the existence of a separate marketing affiliate would deter carriers from providing inferior basic services to their enhanced services competitors or from providing their enhanced services operations with preferential access to customer information. Tymnet claims that such separation would not significantly confuse or inconvenience AT&T's and the BOCs' enhanced service customers since those customers are principally "well-educated" businesses. Tymnet also notes that the *Asynchronous/X.25 Waiver Order* concluded that the BOCs had not made a persuasive showing that the costs of a marketing separation requirement outweigh its benefits to the public.[138]

b. AT&T.

65. Parties that are particularly opposed to structural relief for AT&T, such as GTE and RCA, contend that such relief is premature for four reasons: (a) many enhanced services are in their infancy; (b) divestiture occurred only recently; (c) equal access for interexchange services has not yet been achieved; and, most importantly, (d) AT&T possesses overwhelming market power in a number of regulated markets such as interexchange telecommunications, data transmission (via its Dataphone Digital Service), terrestrial private lines, and 800 and 900-type services. Such opponents emphasize AT&T's large market share in these areas, as well as its large size, resources, and integrated nature. Indeed, RCA claims that divestiture intensified the potential for AT&T to discriminate against enhanced services providers, as illustrated by AT&T's delays in installing private lines and by its "discriminatory" rate increases for private line service. In addition, they argue that AT&T enjoys certain advantages in offering basic services, such as premium interconnection arrangements between its interstate facilities and all local exchange carriers, that give it a technical superiority over all other carriers and a marketplace advantage. Accordingly, opponents claim that our consideration of structural relief for AT&T should be deferred until competition in long distance services develops further.

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[138] Tymnet Reply Comments at 26, *citing Asynchronous/X.25 Waiver Order*, 100 FCC 2d at para. 109.

66. Similarly, a number of parties claim that AT&T's control of domestic facilities that connect end-users in the United States to primary international carrier facilities creates substantial power over international carriers. They contend that as a result of these factors, AT&T has both the ability and incentive to shift costs from its competitive service offerings to its regulated services. Accordingly, ITT and others caution that the anticompetitive dangers that prompted our adoption of structural separation for AT&T in the *Final Decision* still remain and that accounting safeguards will not adequately control such practices.

67. Opponents also claim that structural relief for AT&T would "remonopolize" U.S. telecommunications, since the economies of scale for AT&T would be so great in offering some enhanced services that it could eliminate competition. Further, RCA suggests that the vast size of AT&T's basic service offerings compared to its enhanced service offerings would permit it to engage in improper shifting of costs between basic and enhanced services and in predatory pricing. RCA thus concludes that structural relief will enable AT&T to bypass the BOCs' local exchange facilities and become "the dominant supplier of all telecommunications services in all markets, including specifically exchange services for large users."[139] It notes in its reply comments that the BOCs' comments support this suggestion.

68. Finally, commenters argue that moderate adjustments to the existing enhanced/basic definitional framework, coupled with the retention of structural separation, would best serve the marketplace and ratepayers by permitting AT&T to offer some integrated enhanced services while retaining the proven structural safeguards.

c. *The BOCs*

69. Opponents of structural relief for the BOCs make arguments similar to those presented in opposition to structural relief for AT&T. These parties strongly contest the claim that the BOCs no longer have market power or the ability to act anticompetitively. They contend that the BOCs' resources and anticompetitive motivations have not substantially changed since our decision to impose structural separation in the *BOC Separation Order*. They argue that even if AT&T, IBM and GTE are larger and have greater resources than each of the BOCs, this does not diminish the BOCs' economic significance. Opponents

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[139] RCA Reply Comments at 10.

such as MCI and IDCMA contend that the BOCs overstate the impact of bypass or potential bypass on their ability to cross-subsidize. They note that business customers often engage in "service" bypass by employing a BOC-supplied private line rather than BOC local exchange facilities and argue that such service bypass does not affect the BOC's potential anticompetitive behavior. The opponents of structural relief for BOCs further argue that as a result of the BOCs' ownership of local networks, the vast majority of telecommunications users have no alternative to the use of the BOCs' facilities to access local and interexchange networks.

70. In addition, opponents argue that the BOCs' regulated operations are quite profitable, both in absolute terms and relative to their unregulated activities. This profitability, they contend, leaves a significant potential for cross-subsidization that state and federal regulators cannot effectively control through accounting safeguards. Accordingly, opponents of structural relief claim that the BOCs' ability and incentive to cross-subsidize to the detriment of their competitors remains unchanged since the *BOC Separation Order*. They further argue that the BOCs remain willing to use their bottleneck facilities to discriminate against their enhanced services competitors. ATAE, an alarm services provider, and Lee, a mass-announcement service provider, describe circumstances under which BOCs allegedly denied them access to their local networks.[140] Opponents of structural relief also contest any claim that standards organizations do not permit the BOCs to dictate network standards. Commenters claim the BOCs and AT&T design their own standards independently of such organizations and, in any event, dominate such organizations.

71. Finally, some commenters contend that any hindering of BOC innovation in enhanced services has been caused by the *MFJ* prohibition on BOC provision of information services and is not attributable to the Commission's structural separation requirements. They argue that structural separation will be required to preserve competitive markets if and when the *MFJ* restrictions are finally removed.

B. Discussion

1. Standard for Reviewing the Applicability of Structural Separation to the Enhanced Service Operations of AT&T and the BOCs.

72. As we have often noted, the structural separation require-

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[140] ATAE Comments at 14-15, 25-29; Lee Comments at 6-8.

ments we established in *Computer II* were a pragmatic attempt to fashion a set of conditions governing the relationship between regulated and unregulated operations of dominant carriers that would maximize the long-term welfare of consumers of communications services.[141] We applied those requirements to AT&T's enhanced services and CPE operations based on our perception that their benefits, in protecting deregulated markets from anticompetitive behavior and ratepayers from improper cost-shifting, outweighed the costs imposed on AT&T and its customers in duplication of facilities and personnel, retarded innovation through inefficiencies in research and development, and sluggish or inappropriate responses to changing market conditions. We permitted other dominant carriers, however, such as the GTE Companies, to provide CPE and enhanced services subject only to accounting separation. In concluding that structural separation was warranted for AT&T, but not for other dominant carriers, we were strongly influenced by AT&T's status as the world's largest corporation and, in particular, as the dominant provider of telecommunications goods and services in the United States. At the time, the *Final Decision* was adopted, AT&T provided more than 95% of interexchange services, more than 80% of local services, and more than 60% of CPE in the nation as a whole. Given AT&T's vast size and resources, its vertically integrated structure, and its ability to engage in anticompetitive cross-subsidization and discrimination through its control of bottleneck facilities, we found structural separation to be an appropriate form of regulation.

73. After the divestiture of the BOCs from AT&T, we were presented with the question of whether these former members of the Bell System should also be subject to structural separation. In analyzing the applicability of structural separation to the BOCs we had to perform a "difficult balancing." The BOCs were smaller than the predivestiture AT&T, had no embedded CPE customers, were unable to provide interexchange services, and in many respects individually resembled GTE, which we had exempted from the structural separation requirements. In addition, at the time of the *BOC Separation Order*, no BOC had announced any plans to market enhanced services. Despite these factors, we

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[141] *See, e.g., AT&T Structural Relief Order* at 671–72, para. 28. In the *Final Decision*, we recognized that structural separation is not an end in itself, but a regulatory tool for protecting the public interest, to be altered "as experience and changed circumstances warrant." 77 FCC 2d at 463, para. 207. *See also Notice* at paras. 35–36.

determined that because the BOCs retained sufficient ability to shift costs from unregulated to regulated operations, and to discriminate against competitors' offerings through the control of local bottleneck facilities, structural separation was the most cost-effective form of regulation in the situation then existing. Accordingly, we concluded that structural requirements should be imposed on the BOCs' CPE, enhanced services, and cellular offerings as a protective measure to ensure that emerging competitive forces would not be undermined and to protect ratepayers during the uncertainty surrounding divestiture. Furthermore, we explicitly stated that we would review the applicability of this requirement within two years, "in light of prevailing circumstances."[142] In addition, because of our lack of experience with the provision of enhanced services by the BOCs, we emphasized that "as we develop more of a record on potential BOC enhanced service offerings we will be prepared to refine our separation requirements to be no broader than are necessary to accomplish our policy objectives. . . ."[143]

74. In the *AT&T Structural Relief Order*, we generally followed the same type of cost-benefit analysis that we used in *Computer II* and the *BOC Separation Order* to reach the conclusion that structural separation should no longer apply to AT&T's CPE operations.[144] In doing so, however, we not only compared the benefits of structural separation to its costs, but we also implicitly compared the net benefits of structural separation to the net benefits of nonstructural safeguards. We found that benefits from the structural separation requirements had substantially decreased due to the post-divestiture AT&T's reduced ability to discriminate against its CPE competitors and to shift costs from its CPE operations to its regulated network operations, while the costs of the requirements had decresed little, if at all. We also concluded that certain nonstructural safeguards could protect against the potential for anticompetitive conduct presented by the new AT&T at substantially reduced cost to AT&T, ratepayers, and consumers. Consequently, we replaced structural separation with these nonstructural safeguards for AT&T's CPE operations.

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[142] *BOC Separation Order* at 1140, para. 62.

[143] *Id.* at 1127-28, para. 22. In the *BOC Separation Reconsideration*, we indicated that other regulatory measures might well be appropriate in the future.

[144] *AT&T Structural Relief Order* at 673, para. 30.

75. We further refined the cost-benefit analysis we adopted in the *AT&T Structural Relief Order* in the *BOC Structural Relief Notice*. In that Notice, we stated that carriers' ability to engage in anticompetitive discrimination and improper cost shifting was of primary importance in assessing the benefits of structural separation. We also said, following the implicit approach of the *AT&T Structural Relief Order*, that these benefits were not to be measured exclusively against the costs of structural separation in determining whether it remained a viable form of regulation, but should also be measured against the costs and benefits of alternative nonstructural safeguards. Thus, we concluded that even if structural separation has a net positive benefit in an absolute sense, if alternative safeguards are on the whole more beneficial to society, then it would be incumbent upon us to replace structural separation with those alternative safeguards.

76. We believe that these standards are generally appropriate in examining the continued application of structural separation to the enhanced services activities of AT&T and the BOCs. However, several modifications are necessary to take into account the technical differences between CPE and enhanced services. In assessing the incentives and ability of AT&T and the BOCs to engage in improper discrimination and cost shifting, we note that they potentially can offer certain enhanced services by technically and functionally integrating them with basic services. This contrasts with CPE's essential separability from basic services. Accordingly, we recognize and must assess the potential for anticompetitive conduct caused by such integration. At the same time, we also recognize the potential for efficiencies and cost savings that such integration may provide for consumers of basic and enhanced services. In addition, we believe that the overall competitive conditions of the present enhanced services market are relevant to our analysis. A significant factor in considering those competitive conditions is the ability of carriers and their competitors to provide integrated "system solutions" to consumers' telecommunications and information processing needs.

77. We seek to maximize the public's ability to obtain efficient, low-cost telecommunications service, with emphasis in this proceeding on enhanced services. As in *Computer II*, the *BOC Separation Order*, the *AT&T Structural Relief Order*, and the *BOC Structural Relief Notice*, we believe that free and fair competition is the best way to achieve that goal. Accordingly, we seek to impose only those restrictions on the participation of AT&T and the BOCs in the enhanced services marketplace that best promote

such competition and protect ratepayers of regulated services from improperly being assessed the costs of these competitive activities.

2. *Costs and Benefits of Structural Separation for AT&T's Enhanced Services Operations.*

78. In examining the costs and benefits of the structural separation requirements for AT&T's provision of enhanced services, we remain cognizant of the factors that led us to conclude in the *AT&T Structural Relief Order* that those requirements were no longer appropriate for AT&T's provision of CPE.[145] Since the adoption of the *Final Decision*, the telecommunications environment in which AT&T must function has been subject to rapid, and almost constant, change. The divestiture of the BOCs pursuant to the *MFJ*, the implementation of our access charge plan, the conversion of a substantial portion of all local exchange facilities to "equal access" and the corresponding increase in competition in interexchange services, and the continued evolution of the CPE marketplace to its current highly competitive state, are just a few of the changes that have had significant impacts on the telecommunications industry in the last few years. In light of these changes, and AT&T's minimal presence in the current enhanced services market,[146] we believe that reevaluation of the structural separation requirements for AT&T's provision of enhanced services is not only appropriate, but necessary, if we are to fulfill our duty to protect the public interest pursuant to the Communications Act of 1934.[147]

a. Costs

79. We find, based on our review of the extensive record compiled in this proceeding and our experience with the provision of enhanced services under the *Computer II* regime, that our structural separation requirements create significant inefficiencies for AT&T and consumers in the enhanced services market and should be removed and replaced with appropriate nonstructural safeguards. Structural separation effectively prohibits the offering of all enhanced services that could be efficiently integrated or

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[145] *See AT&T Structural Relief Order* at 672-73, para. 29.

[146] The effort that AT&T was devoting to the development of enhanced services at the time the Commission adopted the *Computer II* decision created an expectation that AT&T would probably have a major presence in that market in the near future. AT&T has not as yet succeeded in establishing such a market presence.

[147] 47 USC § 151.

collocated with AT&T's basic services, but that cannot be offered on a cost-effective basis subject to structural separation. Thus, as a result of our regulatory requirements, services that would provide valuable benefits to the public may never be offered. At least one example of such a service is Custom Calling II, which promised significant benefits when proposed by the pre-divestiture AT&T, but was never offered.[148] The credit card and check clearing services mentioned in AT&T's comments are further examples of services that could well satisfy user needs in an efficient manner that structural separation currently prohibits. We agree with those commenters who observe that, while there have been significant and demonstrable benefits to ordinary consumers from the competitive developments in the CPE and interexchange services marketplaces, these consumers have yet to receive comparable benefits from competition in enhanced services. We are convinced that there is at least a substantial likelihood that our regulations in this area have been part of the problem, not part of the solution.

80. Structural separation for AT&T's enhanced services operations may also potentially deny it the opportunity to realize economies of scope from the commonality of inputs (such as technology and expertise) that it uses to create its different products. We found in the *AT&T Structual Relief Order* that the inability to realize such scope economies was one cost of structural separation for AT&T's provision of CPE; and we believe the elimination of such costs could well result in efficiencies for AT&T's provision of enhanced services, to the extent that such services could be integrated into or collocated with AT&T's basic network facilities.[149] Because AT&T has substantial expertise and experience in developing and implementing communications services, more efficient use of its resources in creating new enhanced services on an unseparated basis could provide significant scope economies. In the *AT&T Structural Relief Order*, we noted that structural separation for AT&T's CPE operations restricts the free flow of information within AT&T and may have substantially increased the costs of developing and marketing new products.[150] Structural separation probably has an even more significant impact on the development of enhanced services, since

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[148] See, *supra* para. 17.

[149] *AT&T Structural Relief Order* at para. 678, 38, *citing* Bailey and Friedlander, *Market Structure and Multiproduct Industries*, 20 J. Econ. Lit, 1024, 1031-33 (1982).

[150] *AT&T Structural Relief Order* at 678, para. 38.

it prevents the efficient use of technical information and expertise that could be profitably employed in both basic and enhanced services. Moreover, we note that AT&T is now capable of offering basic services, CPE, and the limited class of non-collocated, enhanced services addressed in the *AT&T Limited Waiver Order*, on an unseparated basis. The remaining structural separation requirements only apply to integrated or collocated enhanced services. Consequently, they intrude on AT&T's ability to provide key components of the systems-type solutions that users demand and can receive from other concerns and with resources comparable to AT&T's.

81. The costs of foregone opportunities for new services and scope economies are supplemented by the more obvious direct costs of duplicating personnel and facilities. Such costs have not been particularly significant for AT&T because of its limited participation in the enhanced services market; however, such costs would be expected to increase were AT&T to expand its enhanced services operations. Furthermore, we find that, in addition to the costs imposed on AT&T's enhanced services operations, it is likely that the structural separation requirements for enhanced services impose costs on AT&T's regulated operations to an even greater degree than we found in the *AT&T Structural Relief Order* for its provision of CPE.[151] AT&T could realize economies from coordinated research, development, marketing, and implementation of basic and enhanced services. The costs of these lost economies from structural separation may just as easily manifest themselves in AT&T's regulated operations, and be borne by ratepayers in the form of higher prices and lower quality of basic services, as in AT&T's enhanced service operations. In addition, the structural separation requirements could inhibit research or development efforts to design new, efficient basic services that could possibly be construed as enhanced. In either event, ratepayers forego efficiency savings that could be realized if nonstructural safeguards replaced structural separation.

b. Benefits.

82. The first important benefit we hoped to achieve through the imposition of the structural separation requirements we adopted in the *Final Decision* was to limit AT&T's ability to cross-subsidize its unregulated offerings by improperly allocating some

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[151] *See id.* at 678, para. 39. The possible economies resulting from integrating enhanced services offerings with basic services do not apply to as great an extent for CPE.

costs of those offerings to its regulated operations. Structural separation discourages cross-subsidization in at least two ways. First, it forces cost allocations from unregulated to regulated operations to cross corporate boundaries, making such cost shifting more difficult to accomplish and easier to detect. Second, it eliminates the possibility of improper cost shifting within activities that are joint or common to both basic and enhanced services by prohibiting such activities from taking place.

83. We find that AT&T's ability to shift costs from its unregulated to its regulated services has been reduced to some extent by industry changes since the *Final Decision*. Divestiture eliminated AT&T's control over the most significant operations it could use for cross-subsidization — its former local exchange companies. Even though AT&T retains a substantial market presence in some network services, such as some terrestrial private line offerings, 800 service, domestic and international MTS, AT&T does not possess facilities that are protected by a governmental grant of monopoly status and its activities increasingly are subject to competition from other interexchange carriers whose services are now available to a majority of all residential and business users. Moreover, divestiture of the BOCs has caused AT&T to lose a substantial portion of its former captive markets for manufacturing and research and development. Before divestiture, costs of developing an enhanced offering potentially could be charged to the costs of developing a local exchange network service or equipment since the costs added to such development would be borne by an AT&T-owned operating company. With divestiture, AT&T no longer performs research and development work for BOC services. Furthermore, the equipment prices charged by AT&T's manufacturing arm are increasingly subject to marketplace discipline, since the BOCs are actively purchasing equipment and services from vendors other than AT&T. The decreased volume of AT&T's equipment sales to its existing affiliates is an indication of its reduced ability to cross-subsidize.[152]

84. Despite the reduction in AT&T's ability to shift costs from its unregulated to its regulated operations without suffering losses to competitors, we do realize that its provision of enhanced and basic services on an integrated basis could cause it to incur significant joint and common costs in the course of research, design, development, marketing, installation, operation, mainte-

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[152] *See supra* para. 53.

nance, billing, and repair. We acknowledge, therefore, that cost allocation requirements for such services must be carefully designed and implemented, and we are prepared to do so.

85. A second major benefit we hoped to gain from the imposition of structural separation on AT&T was to prevent it from using its control of local and interexchange network facilities to discriminate against users or suppliers of competing unregulated offerings. Enhanced service providers typically build their offerings on the basic service offerings of carriers and thus are vulnerable to discriminatory treatment in the provision of such services. We recognized the potential for such discrimination through AT&T's ability to set interconnection standards, such as proprietary data protocols, that could hinder the interconnection of competitors to the network. We also recognized the possibility that AT&T could install and maintain the basic services it provided to its enhanced services customers or competitors in a manner calculated to harm competing enhanced service providers.

86. Interconnection to local networks is frequently a key factor in the provision of competitive enhanced services. We acknowledge that AT&T's control over interexchange facilities enables it to set interexchange standards in some situations, but we conclude that developments have also circumscribed this ability. First, since divestiture has removed the local exchange from AT&T's control, it no longer has the ability to set discriminatory interconnection standards for local exchange services. Second, competition in interexchange services has increased substantially since the time of *Computer II*, and attempted discrimination by AT&T in the installation and maintenance of basic facilities could cause other enhanced service providers and customers to seek alternative basic service providers. Third, we have specifically designed nonstructural safeguards, such as CEI and the Open Network Architecture requirements, to address these discrimination concerns, and we conclude that these safeguards will effectively prevent discrimination with substantially lower costs than those imposed by structural separation.

87. An additional factor underlying our analysis of the costs and benefits of structural separation is the "sensitivity" of competition in the enhanced services market to anticompetitive activities by AT&T or the BOCs. Our concerns about the enhanced services market have been mitigated to some degree by the continued competitive development of that market since the *Final Decision*. AT&T's role in the present enhanced services market cannot be described as dominant or even major. The

ongoing competitive nature of this market reduces our previous concerns that structural separation is necessary to prevent potential anticompetitive behavior, and thus reduces the relative benefits of structural separation compared to nonstructural safeguards.

3. *Costs and Benefits of Structural Separation for BOC Enhanced Services Operations.*

88. In reaching our tentative conclusion in the *BOC Structural Relief Notice* that the BOCs should be permitted to provide CPE free of our existing structural separation requirements, we observed that the conditions currently prevailing in the telecommunications industry are quite different from those in 1983 when we adopted those requirements for the BOCs. We indicated that we were no longer concerned with how divestiture would work since the initial, difficult transition period, which we anticipated would occur, has been substantially completed. We concluded that in these circumstances the protective measures we found appropriate in the immediate, post-divestiture period no longer should be justified as transitional measures, but should be judged on their own merits under current conditions. This conclusion is as applicable to the BOCs' provision of enhanced services as it was to their provision of CPE. Thus, we will begin the reevaluation of the structural separation requirements for the BOCs that we promised in the *BOC Separation Order* without the specific concerns that divestiture raised in that proceeding, and with a strong obligation to ensure that any requirements we establish or retain for the BOCs serve the public interest.

a. Costs.

89. Experience with the structural separation requirements for the divested BOCs established in the *BOC Separation Order* has demonstrated that those requirements hinder the introduction of enhanced services that could benefit the public by being widely and efficiently available through the BOCs' local exchanges. Structural separation imposes opportunity costs by discouraging the BOCs from designing innovative enhanced services that utilize the resources of the public switched network. Such innovation losses, resulting from the physical, technical, and organizational constraints imposed by the structural separation requirements, directly harm the public, which does not realize the benefits of new offerings.

90. For example, one set of services that was completely foreclosed to the public as a result of our structural separation rules was the Custom Calling II VMS services.[153] In denying a waiver request by AT&T to permit it to offer such services through its local exchange affiliates, we assumed that competing providers would offer similar services. However, no such network-based services have been offered. While commenters assert that offerings such as telephone answering machines, telephone answering and VMS service bureaus, PBX features, and stand-alone VMS equipment are wholly adequate substitutes for Custom Calling II, we believe that the *Computer II* regulatory regime has prevented consumers, and particularly small-business and residential consumers, from having yet another choice — the Customer Calling II-type services — in the VMS marketplace.[154]

91. We further recognize that structural separation imposes direct costs on the BOCs from the duplication of facilities and personnel, the limitations on joint marketing, and the inability to take advantage of scope economies similar to those we noted for AT&T.[155] These are indications of more fundamental costs of structural separation — namely, that the BOCs are unable to organize their operations in the manner best suited to the markets and customers they serve. The net result of these costs in delayed services and innovation, in direct duplicative costs, and in organizational inflexibility, is that structural separation prevents consumers from obtaining services and service combinations that they desire. Large business subscribers that cannot obtain "system solutions" to their service needs from the provider of basic services due to structural separation are forced to accept services that do not best serve their needs. Furthermore, because of the substantial ubiquity of the BOCs' local exchange networks in their operating areas, the BOCs could be especially effective in offering enhanced services to residential and small business customers. Thus, structural separation may have a significant impact on these "small" customers as well. These costs, which are potentially very significant, can be eliminated to a large extent if structural separation is replaced with nonstructural safeguards. Even though such safeguards, by their very nature, would place

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[153] *See Custom Calling Denial Order*. The waiver proceeding leading to the *Custom Calling Denial Order* occurred before the AT&T divestiture. Custom Calling II was designed to be offered through local exchanges, and today presumably would be offered by the BOCs.

[154] For a further discussion of these services and the regulatory proceedings affecting them, see *infra* paras. 307-317.

[155] *See supra* para. 80.

some restrictions on BOC activities, they would largely avoid imposing regulatory limitations on the design and implementation of new services.

92. Some commenters contend that nonstructural safeguards, such as CEI, accounting, and reporting requirements, may be difficult to implement and enforce, especially in comparison with the existing structural separation requirements. We evaluate such claimed difficulties in the context of our cost/benefit analysis by considering our experience with such safeguards. Based on our experience with the nonstructural safeguards we have imposed on GTE, AT&T, and other companies, as well as the substantial costs of structural separation that we have already discussed, we conclude that structural separation imposes much greater costs on the public and the BOCs than do nonstructural regulations.

93. We further conclude that these problems cannot be solved by a limited grant of structural relief or use of the waiver process. Some commenters contend that structural separation should be eliminated only for those services, such as protocol processing, for which obvious integration efficiencies exist. We decline to apply such a limited analysis. We find that the structural separation requirements impose substantial societal costs in restricting BOC provision of all enhanced services. We note that the record supports the assertions by the BOCs and others that some customers want vendors to offer system solutions to their communications and computing needs. We find that, compared with well-tailored nonstructural safeguards, structural separation restricts effective BOC participation in the markets for such system solutions and, accordingly, disserves the public's interest in obtaining the benefits of more price and service competition.

94. We also find the waiver process to be ineffective in addressing the problems we have found with structural separation. Over the last several years, at the request of various BOCs, we have subjected numerous enhanced services, including asynchronous/X.25 protocol conversion, X.25/X.75 protocol conversion, and a spread-spectrum alarm service,[156] to our waiver process to determine whether we should permit such services to be provided without structural separation and, if so, under what conditions. Despite our best efforts to expedite the waiver process, the adversarial nature of such proceedings has delayed

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[156] Applied Spectrum Technologies, Inc. Petition for Declaratory Ruling under § 64.702 of the Commission's Rules Regarding the Status of "Spread Spectrum" Transmission Services, *Memorandum Opinion and Order*, ENF 85-6, Mimeo No. 5532 (released July 3, 1985) (*Spread Spectrum Waiver Order*).

their resolution, which has necessarily deferred any societal benefits that the integrated service could offer.

b. Benefits.

95. In the *Final Decision* in 1980, we found that the enhanced services market was fully competitive. As commenters in this proceeding generally agree, the enhanced services market continues to be extremely competitive, and enhanced services or their functional equivalents are available from a wide array of suppliers of services, CPE, and other equipment. Moreover, participants in this market include such substantial, integrated entities as IBM and GTE, as well as AT&T.[157] We also note that the prohibitions of the *MFJ*, as well as the structural separation requirements of Computer II have severely limited the BOCs' entry into the enhanced service marketplace.

96. Given these factors, and those discussed below, we conclude that the benefits of structural separation in protecting ratepayers and the enhanced services market from potential anticompetitive practices by the BOCs are not significantly greater than such benefits provided by nonstructural safeguards. We find that some of the technical and market developments noted by supporters of structural relief will limit the BOCs' ability to engage in the forms of anticompetitive behavior we considered in the *Final Decision* and the *BOC Separation Order*. The availability of bypass and other new technologies places some limits on the BOCs' ability to shift costs from their unregulated services to their regulated offerings without reducing the demand for those offerings. This is evidenced by the increase of competition in intraLATA toll markets and the development of private networks and shared tenant services. The persistent political and regulatory pressures to minimize rural, residential, and small business local exchange rates, even to levels below cost, also limit the BOCs ability to shift costs to regulated services. We do not conclude, however, that the BOCs' motivation to cross-subsidize has decreased because of these developments. Nor do we underestimate the potential danger that BOCs could misallocate costs. As we indicated for AT&T's provision of enhanced services, we are committed to developing cost allocation methods that will be required to minimize the ability of the BOCs to shift costs properly attributable to their unregulated activities to their

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[157] As a result of the *AT&T Structural Relief Order* and the *AT&T Limited Waiver*, the structural separation requirements apply only to AT&T's provision of integrated enhanced services.

regulated operations.[158] Our recent adoption of the *Joint Cost Notice* is a significant step in helping us achieve this goal. That proceeding will enable us to develop procedures to account for all joint and common costs incurred in the provision of unregulated services by regulated common carriers.

97. We also conclude that our nonstructural requirements will perform as well as structural separation in combating the possibility of discrimination by the BOCs. We believe that the discrimination potential inherent in the BOCs' control of the local exchange monopolies has eroded since the *BOC Separation Order.* We do not dispute that the BOCs retain some ability to establish network standards that discriminate against competing enhanced services. However, several factors check the BOCs' use of this power. First, when setting network standards the BOCs must coordinate with one another, other exchange carriers, and interexchange carriers through standards groups such as the T1 Committee. While the standards adopted by these groups are voluntary, significant departures by the BOCs that affected enhanced service vendors' ability to provide services would be readily apparent to industry participants and the Commission, and would be subject to investigation and appropriate remedies.[159] Second, the growth of bypass and other alternatives to local service, by eroding the local monopolies, will limit the effects of such discrimination to some extent. Third, and most importantly, our CEI and Open Network Architecture requirements are specifically designed to ensure that all enhanced services providers, including the BOCs' unregulated operations, receive equal access to the BOCs' basic facilities, and our information disclosure requirements give enhanced service providers timely technical and marketing information in order to utilize those basic facilities.

4. *Removal of Structural Separation for AT&T's and the BOCs' Enhanced Service Operations.*

98. The relative costs and benefits of the structural separation requirements now imposed on the enhanced services operations of AT&T and the BOCs, compared with the costs and benefits of nonstructural safeguards designed to serve the same regulatory

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[158] *See supra*, para. 84.

[159] The T1 Committee includes representatives of the BOCs, other exchange carriers, interexchange carriers, and equipment manufacturers. The differing competitive interests of their members should aid in detering significant departures from recommended standards that adversely affect the provision of enhanced services.

goals, lead us to conclude that the structural requirements should be eliminated. This action will benefit all users of these carriers' services, both basic and enhanced. We find that for the provision of enhanced services, the costs from the structural separation requirements in lost innovation and inefficiency render these requirements far less desirable than nonstructural safeguards. These conclusions are based on the continuing competitive evolution of telecommunications markets, as well as our experience applying both structural and nonstructural safeguards. Pursuant to our decision, in the event that AT&T or any BOC chooses to offer an enhanced service[160] and conforms with the appropriate nonstructural safeguards detailed in this order,[161] it may do so without regard to the structural separation requirements established in *Computer II* or the *BOC Separation Order*.

99. Our elimination of structural separation for AT&T and the BOCs will permit these carriers to engage in the joint marketing of enhanced and basic services. We do not view such joint marketing as an improper, anticompetitive practice by these carriers and see significant public costs and few benefits in carving out a limited area of structural separation for marketing. Marketing plays an important role, and represents a significant cost, in bringing new services to the public. We see no reason to handicap AT&T and the BOCs competitively in this regard, particularly when significant competitors in the markets for enhanced and integrated systems are not so limited. Again, in our view, the nonstructural safeguards we establish in this *Order* adequately address the legitimate concerns of some competitors that joint marketing not provide a vehicle for cross-subsidization, discrimination in the provision of basic services, or improper use of customer proprietary information.

IV. ALTERNATIVE REGULATORY FRAMEWORKS

100. In light of our decision to remove the structural separation requirements from the enhanced service offerings of AT&T and the BOCs, we now consider what alternative regulatory ap-

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[160] While we do not attempt in this *Order* to interpret the scope of the *MFJ*'s prohibition on the offering of "information services" by BOCs, we acknowledge that it obviously restricts the types of enhanced services the BOCs are currently able to offer. However, we think we should establish an appropriate regulatory framework for BOC enhanced service offerings now, both because some enhanced services do not fall within the *MFJ* restrictions and because if those restrictions were eventually lifted, it would serve the public interest to have a set of rules in place that address BOC participation in those markets.

[161] *See infra* paras. 111-265.

proaches should be established in their place. While we have found that structural separation no longer serves the public interest, that finding was explicitly conditioned on the adoption and implementation of an effective set of nonstructural regulations to guard against the continued potential for improper cost shifting and discrimination by dominant carriers. We have not concluded that AT&T and the BOCs no longer have any ability to engage in such activities, only that such activities can be adequately prevented by regulatory measures with substantially lower costs to the public than those caused by structural separation. In the *Notice*, we proposed one alternative regulatory regime that would depart substantially from the framework of *Computer II* by requiring the creation of a new definitional framework, in which an analysis of the economic characteristics of an enhanced service would be a key factor in determining our regulatory treatment of the service. Based on the results of this analysis, we would regulate under Title II, not regulate at all, or impose a set of nonstructural safeguards on the offering of particular enhanced services by dominant carriers. In this *Order* we have decided not to adopt this economic analysis approach, based in part on widespread concerns expressed in the comments that its implementation would be highly problematic. Rather, we have decided to apply the nonstructural safeguards identified in the *Notice* to the enhanced service offerings of AT&T and the BOCs. Among the most important of these safeguards is the requirement of Comparably Efficient Interconnection for particular enhanced service offerings. We adopt this requirement and extend it to the development of an Open Network Architecture for enhanced services generally. Finally, we defer to the *Supplemental Notice* the issue of whether these requirements also should apply to the enhanced service offerings of the independents.

A. The "Part II" Proposal.

101. The *Computer II* approach for distinguishing between regulated and unregulated services is based on the basic and enhanced service categories. That approach determines the regulatory treatment of individual offerings according to the category into which they fall. Although we considered the economic characteristics of the enhanced and basic service markets in determining the most suitable regulatory treatment of each category,[162] we

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[162] *See, e.g., Final Decision*, 77 FCC 2d at 425–26, para. 109.

defined those categories in terms of their technical and functional characteristics.

102. The fundamentally new regulatory approach we proposed in Part II of the *Notice* (the Part II approach) sought to eliminate the rigid link between technical service definitions and regulatory treatment by focusing on the economic questions that underlie the issues that arise in the course of our proceedings addressing the provision of enhanced services. The Part II approach proposed to make the market power of the offeror of a service and the economic characteristics of the market in which that service is offered the key determinants for developing the most appropriate form of regulation for that service. We have applied these principles in determining appropriate forms of common carrier regulation for carriers with various degrees of market power in our *Competitive Carrier* decision.[163] The Part II approach sought to apply such economic analysis as the criterion for determining the regulatory treatment of particular services.

103. The Part II approach proposes redefining the *Computer II* service categories into three categories: "basic communications services," which would be equivalent to the existing basic category; "services ancillary to communciations," which would include enhanced services and CPE; and "non-communications services," which are activities that are not related to the provision of communications services. Under the Part II approach, we would continue to regulate basic communications services under our Title II jurisdiction.[164] Moreover, non-communications services would continue to be unregulated.[165] However, services ancillary to communications would be regulated according to an analysis of several factors, including: (a) whether the service is

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[163] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor, *Notice of Inquiry and Proposed Rulemaking*, CC Docket No. 79-252, 77 FCC 2d 308 (1979); *First Report and Order*, 85 FCC 2d 1 (1980); *Further Notice of Proposed Rulemaking*, 84 FCC 2d 445 (1981); *Second Report and Order*, 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (1983); *Further Notice of Proposed Rulemaking*, 47 Fed. Reg. 17308 (1982); *Third Report and Order*, 48 Fed. Reg. 46791 (1983); *Third Further Notice of Proposed Rulemaking*, 47 Fed. Reg. 28292 (1983); *Fourth Report and Order*, 95 FCC 2d 554 (1983); *Fourth Further Notice of Proposed Rulemaking*, 49 Fed. Reg. 11856 (1984); *Fifth Report and Order*, 98 FCC 2d 1191 (1984); *Sixth Report and Order*, 99 FCC 2d 1020 (1985), *rev'd and remanded sub nom.*, *MCI Telecomm'ns Corp.* v. *FCC*, 765 F.2d 1186, (D.C. Cir. 1985).

[164] Title II of the Communications Act, 47 USC § 201 *et seq.*

[165] We requested comment on whether we should adopt certain non-structural safeguards for the provision of non-communications services offered by dominant carriers, to control improper cost-shifting and transfers of capital from communications to non-communications activities. *See Notice* at paras. 56-63.

offered by a dominant carrier; (b) the economic characteristics of the service at issue (*i.e.*, whether it can be offered on an effectively competitive basis); and (c) whether, if a dominant carrier is to offer the service in a competitive market, others would have to depend on the carrier's "bottleneck facilities" to compete with the service.[166] For example, noncompetitive, ancillary-to-communications services offered by a dominant carrier would be regulated under Title II of the Act, while competitive services offered by that carrier for which competitors depend on its bottleneck facilities would be subject to a number of nonstructural safeguards. In all other cases, ancillary-to-communications services would be unregulated.[167]

1. Positions of the Parties.

104. While several commenters support the Part II goal of seeking to tailor the regulation of a service to its economic characteristics, the vast majority oppose adoption of this approach as a new regulatory framework. Opposition centers on the treatment of services ancillary to communication. Numerous commenters claim that the "economic characteristics" analysis of such services would create regulatory uncertainty, cause unnecessary delays, and hamper innovation because of its *ad hoc* nature. Some parties argue that substantial analytic difficulties exist in adequately defining the "market power," "competition," "bottleneck," and "dominant carrier" concepts that are crucial to the proposed analysis. They contend that the analysis would involve a fairly complex economic analysis on a service-by-service, market-by-market, and carrier-by-carrier basis, which they characterize as extremely difficult, if not practically impossible, to implement in an efficient fashion.

105. Other commenters oppose the Part II approach because it would extend active federal regulation to the enhanced service operations of the Independents. Still others criticize the Part II approach as possibly exposing to new regulation enhanced service providers that are now unregulated. Parties that oppose structural relief also oppose the Part II approach because of its reliance on nonstructural safeguards, and other parties that support structural relief contend that the Part II approach would be inferior to the *Computer II* regulatory regime with structural separation eliminated. Several commenters claim that the Part II

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[166] *See id.* at paras. 50–55.

[167] *Id.*

approach exceeds our jurisdiction since it would permit us to regulate competitive, data processing-type services under Title II of the Act, a form of regulation that they claim is not authorized by express statutory authority or precedent. Very few parties offered any positive support for the Part II approach, and what little support was expressed was somewhat qualified. For example, while DOJ in its comments endorsed the Part II approach at least in concept, in its reply comments it indicated that based on its review of the concerns expressed by other commenters, it now doubts that this approach could be implemented in practice without undue burden on the industry and the Commission.

106. Numerous parties propose new regulatory regimes in place of both the existing *Computer II* framework and the Part II approach. For example, DOJ, US West, and others urge the Commission to establish an "Open Network Architecture" requirement under which structural separation would be eliminated if carriers provided equal access to their basic network facilities to both their own enhanced service operations and competing enhanced service providers.[168] NYNEX and PacTel suggest schemes to offer competitive service under tariff or "tariff-like" procedures. NYNEX would have the Commission subject competitive services to a form of "forbearance" regulation, which would require tariff filings without price or rate regulation. PacTel supports the filing of tariffs with state regulators for competitive services. Commenters such as Ameritech, BellSouth, Southwestern Bell, USTA, SNET, CCTU, and IIA propose different types of regulatory frameworks that incorporate certain aspects of the Part II approach. Such frameworks would classify telecommunications services based either on the type of Commission jurisdiction under the communications Act (*e.g.*, communications, ancillary, and non-communications services) or on technical differences (*e.g.*, basic, network processing, and enhanced services), with the regulatory treatment of a given service based first on its classification and second on its economic characteristics. Arizona and Texas propose plans in which the states would administer the Part II approach for regional market areas, based on Commission guidelines of acceptable market shares. NARUC proposes a similar regulatory approach that emphasizes an increased role and significant regulatory discretion for the states. Michigan, while supporting the philosophy of the Part II approach, proposes that the Commission leave the implementation of that approach to the

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[168] *See infra.* paras. 201-222.

Joint Board and the states. Finally, FEA proposes a framework that relies on a combination of a vendor's status under the *Competitive Carrier* proceeding[169] and the various types of tariffing procedures specified in that proceeding for a carrier's competitive service activities. Despite the wide array of alternative plans that commenters propose, only the Open Network Architecture proposals receive much attention in the reply round of comments.

107. In addition, numerous parties support retention of the basic and enhanced services categories, but with some modifications to address specific shortcomings of the *Computer II* regulations. For example, parties that oppose structural relief, such as ADAPSO and RCA, also recommend that certain aspects of the enhanced services definition be refined. Many parties that support structural relief, such as IBM, AT&T, DEC, and NTIA, also support retention of the general *Computer II* service categories with some necessary refinements and modifications. For example, IBM argues that the structural separation requirement, not the basic/enhanced definitional boundary, has caused the regulatory problems described in the *Notice*. Accordingly, it advocates structural relief and codification of our past interpretative rulings regarding the enhanced services definition as the best way to solve the existing problems with *Computer II*, rather than adoption of the Part II approach. NTIA and others argue that although the existing definitional scheme is imperfect, the industry has adjusted to it, relies on it, and it has produced some degree of regulatory certainty. According to NTIA, an attempt to create new definitions as in the Part II approach would result in additional, time-consuming administrative disputes and litigation. This general position received widespread support from commenters that support structural relief.

2. *Discussion.*

108. The public comments regarding our proposal to replace the existing enhanced and basic service definitions with the regulatory regime of the Part II approach lead us to conclude that we should not adopt such an approach at this time. The commenters display substantial sensitivity to the possibilities they see in the Part II approach for increased regulatory uncertainty and continued delay and dispute over the introduction of new services. Such sensitivity, expressed by parties from virtually all sectors of the industry, indicates to us that for the present, replacing the

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[169] *See supra*, note 162.

Computer II regulatory regime with the Part II "economic analysis" approach would not create an environment in which the industry could implement the major improvements in efficiency and competition in the enhanced services marketplace that we initiated this proceeding to achieve.

109. We still consider our analysis of the relative inflexibility of the *Computer II* regulatory framework to be fundamentally correct. However, we find that we can realize the benefits of the Part II approach to a large extent by replacing structural separation with appropriate nonstructural safeguards. In particular, our CEI and Open Network Architecture requirements address the concerns of the Part II approach regarding the proper regulatory treatment of a dominant carrier's enhanced service when competing services depend on the carrier's bottleneck facilities.

110. We decline to pursue further the alternative regulatory regimes proposed by some commenters, except to the extent that desirable features of such regimes appropriately implement our goals in this proceeding. For example, the Open Network Architecture concept advanced by US West, DOJ, and others is an important and nonintrusive form of regulation that promotes efficiency and preserves competition. It received substantial attention in the reply round comments and can be implemented within the context of the existing definitional framework. In contrast, the other alternative regimes that parties proposed in their initial comments received relatively little attention in the reply comments. Instead, numerous parties reemphasized the need for retaining the existing framework, with modifications if necessary. As a result, while we received little further guidance on the utility of particular alternative regimes, we received substantial support from commenters that an approach incorporating CEI and Open Network Architecture, such as the one we adopt in this *Order*, will best benefit the public.

B. Comparably Efficient Interconnection, Open Network Architecture, and Other Nonstructural Safeguards.

111. The *Notice* requested comment on the efficacy of a number of nonstructural safeguards in preventing carriers that provide enhanced services unseparated from their basic service operations from engaging in activities that could undermine competition in unregulated markets or subject customers of regulated services to excessive charges. Such safeguards include accounting requirements to control the possibility of improper cost shifting by the

carriers and network information disclosure and CPNI standards to control the potential for certain types of discrimination. We specifically asked whether allowing some or all dominant carriers to offer such services on an unseparated basis should be keyed to those carriers providing "comparably efficient interconnection" or collocation opportunities to other enhanced services providers.[170] In proposing this requirement, we perceived that, freed of the structural separation requirements, dominant carriers could realize efficiencies or provide themselves with forms of interconnection that other enhanced service providers could not obtain. We viewed CEI as a possible way both to maximize the availability and efficiency of such unseparated services and to preserve competition in the markets for such services among the carriers and other enhanced services providers. Although in the *Notice*, we distinguished carrier provision of CEI from carrier provision of collocation opportunities for purposes of soliciting comments, we acknowledge that requiring carriers to offer collocation opportunities to other enhanced service providers is simply a specific type of CEI requirement.

112. The CEI proposals in the *Notice* prompted a substantial response from the commenters. While many parties address only the specific CEI issues posed in the *Notice*, commenters such as DOJ, US West, Northern Telecom, and Siecor extend the CEI proposals by advocating various forms of "Open Network Architecture". We consider Open Network Architecture to be broader in concept than the CEI principles described in the *Notice*, which implied that if a carrier offers an enhanced service, it should be required to offer network interconnection (or collocation) opportunities to others that are comparably efficient to the interconnection that its enhanced service enjoys. Accordingly, a carrier would be required to implement CEI only as it introduces new enhanced services.

113. In contrast to CEI's service-specific emphasis, we consider Open Network Architecture to be the overall design of a carrier's basic network facilities and services to permit all users of the basic network, including the enhanced service operations of the carrier and its competitors, to interconnect to specific basic network functions and interfaces on an unbundled and "equal access" basis.[171] A carrier providing enhanced services through Open Network Architecture must unbundle key components of its

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[170] *See Notice* at paras. 120–29.

[171] The "equal access" standard that we adopt for Open Network Architecture and CEI is discussed *infra*, paras. 147–150.

basic services and offer them to the public under tariff, regardless of whether its enhanced services utilize the unbundled components.[172] These components, such as trunk-side interconnections, may utilize subcomponents that themselves are offered on an unbundled basis, such as separate channel signaling and called or calling signal identification. Such unbundling will ensure that competitors of the carrier's enhanced services operations can develop enhanced services that utilize the carrier's network on an economical basis. We find that Open Network Architecture subsumes CEI, since a carrier that offers an enhanced service and a competitor offering a similar service in an Open Network Architecture environment will utilize the basic network on an equivalent basis.

114. We consider the development of Open Network Architectures to be a focal point of this proceeding. We conclude that the implementation by AT&T and the BOCs of Open Network Architecture plans, approved by this Commission, is a precondition for complete elimination of the structural separation rules for these carriers. We strongly encourage AT&T and the BOCs to begin immediate development of such plans, and we direct that these carriers file their plans with the Commission as soon as possible and, in any event, no later than February 1, 1988.

115. Until implementation of an Open Network Architecture Plan, AT&T or the BOCs may offer a specific enhanced service, or class of services, on an unseparated basis subject to certain conditions. To offer the enhanced service, the carrier must implement CEI for that service pursuant to a CEI Plan, which will be subject to public comment and Commission approval. In addition, the carrier must comply with the other nonstructural safeguards adopted in this *Order*. We are aware that this interim service-by-service, carrier-by-carrier approach is similar, in certain respects, to the waiver proceedings that delayed service innovation and introduction under *Computer II*. However, by establishing the detailed substantive guidelines and expedited review procedures for CEI plans set forth below, we seek to minimize the exploratory, *ad hoc* character of the *Computer II* waiver proceedings and the delays resulting from the regulatory review process.[173] We emphasize, however, that the surest way for AT&T

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[172] However, as we require *infra*, para. 158, carriers subject to these requirements must offer on an unbundled, tariffed basis, those components of basic services that their enhanced service offerings utilize.

[173] These review procedures will include public comment prior to final Commission approval of such plans.

and the BOCs to eliminate the structural separation requirements, in general, and the service-by-service waiver process, in particular, is to develop and implement comprehensive Open Architecture Plans at an early date.[174]

116. In the following paragraphs, we discuss and adopt guidelines and requirements for CEI and Open Network Architecture, first by focusing on CEI and then by generalizing our discussion to consider Open Network Architecture. We then discuss the accounting, network information disclosure, and CPNI requirements that also are necessary components of the regulatory framework we adopt to replace structural separation.[175]

1. Comparably Efficient Interconnection.

a. Application of CEI to Particular Carriers.

117. We first consider the circumstances under which CEI should be required and the parties to which it should apply.[176] Although the *Notice* discussed the possible applicability of CEI to "dominant carriers" in general, a classification adopted in our *Competitive Carriers* proceeding that includes AT&T, the BOCs, and the Independents, it implicitly linked the potential imposition of CEI to structural relief for AT&T and the BOCs. While commenting parties focused on the applicability of CEI to AT&T and the BOCs, some commenters considered its impact on the Independents, which are not subject to the structural separation requirements. Accordingly, we analyze these issues separately — first, with respect to AT&T and the BOCs, and second, with respect to the Independents.

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[174] We note that while the existing *MFJ* restriction on the BOCs' provision of information services will limit their ability to offer enhanced services pursuant to interim CEI Plans, it should also permit them to concentrate on developing long-term Open Network Architecture Plans in preparation for such time as the *MFJ* restrictions may be relaxed or removed.

[175] Because these nonstructural safeguards are designed to prevent AT&T and the BOCs from engaging in anti-competitive cost shifting and discrimination that potentially could occur because of the dominant positions of AT&T and the BOCs in basic telecommunications markets, some or all of these safeguards may no longer apply if AT&T or the BOCs lose market power and control of bottleneck facilities.

[176] Despite the apparent widespread support for CEI, some commenters that support the CEI concept, such as RCA, Xerox, and CCTU, also call for a further rulemaking or another round of comments in this proceeding on the CEI issue in general. They point to the disputes in the record concerning the scope and substance of possible CEI requirements in support of their position. Other commenters, such as AAR and Minnesota, are noncommittal regarding the CEI concept, but also request further proceedings.

(1) Positions of the Parties.

(a) Application to AT&T and the BOCs.

118. Most commenters that address the CEI issue contend that AT&T and the BOCs should make CEI available to other enhanced services providers as a condition procedent to removal of the structural separation requirements now governing their enhanced service offerings. Enhanced service providers and their trade organizations, such as CompuServe, IIA, and EMA, view such a requirement as crucial toward: (a) maximizing the availability of integrated enhanced services; (b) preventing possible improper discrimination by carriers; and (c) preserving the competitive nature of enhanced services markets. For the same reasons, DOJ supports applying a specific set of CEI requirements (its version of Open Network Architecture) to bottleneck monopolies as a way to reduce the potential for abuse of their monopoly power. In this way, according to DOJ, the Commission can rely on interconnection technology, rather than external regulations, to minimize the competitive and efficiency dangers of bottleneck control.

119. Many local exchange carriers, including both the BOCs, and major Independents, such as Cincinnati Bell and SNET, support the imposition of some form of CEI in place of structural separation for AT&T and the BOCs. US West, in particular, supports a version of Open Network Architecture as a replacement for the *Computer II* regulatory regime, and Ameritech proposes a particular network architecture, called Feature Node/Service Interface (FN/SI), to fulfill CEI requirements in efficient and nondiscriminatory ways. NYNEX, PacTel, and BellSouth also support the substitution of CEI requirements for structural separation. However, some BOCs are apparently neutral on this issue, commenting, for example, on how CEI should be priced or implemented, but not on whether it is necessary for the removal of the structural separation requirements.[177] Manufacturers and their representatives, such as IBM, DEC, IDCMA, and CBEMA, generally view CEI as a crucial prerequisite to removing structural separation to prevent competitive abuses by AT&T and the BOCs and to increase realizable efficiencies for all enhanced service providers. Moreover, a number of users and user groups, including TCA and UTC, support such requirements as preconditions for the removal of structural separation. Michigan

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[177] *See, e.g.*, Bell Atlantic Comments at 16–20; Southwestern Bell Comments at 25.

suggests that the Commission and the state regulators work together, using the Joint Board mechanism, to develop CEI standards.

120. While a minority of commenters oppose adoption of a CEI requirement, most of their objections are directed toward any relaxation of the structural separation requirements. For example, some enhanced services providers that oppose structural relief, such as Lee and Wang, attack the proposed CEI standard as being anticompetitive because it does not explicitly require carriers to provide equal interconnection for their enhanced service competitors. If structural separation is removed, Lee envisions a CEI environment that is "chaotic, discriminatory and riddled with perpetual and intractable problems for . . . competitors [of AT&T and the BOCs]."[178] Similarly, MCI attacks the CEI proposals as vague and ill-defined. It contends that a CEI requirement will create new opportunities for carriers to discriminate in setting CEI interface standards, and that CEI will not stop cross-subsidization. In addition, while NTIA supports the CEI proposals in the *Notice* as being procompetitive, it strongly argues that relief from structural separation should not be delayed during the time it takes to develop a complete definition of CEI.

121. Among the commenters addressing the CEI issue, there is little disagreement that if we impose CEI requirements, they should apply to the BOCs. The comments of the BOCs themselves either support CEI as a replacement for the structural separation requirements or assume that CEI, if adopted, will apply to them. Essentially all other commenters that consider the applicability of CEI requirements either advocate or assume that CEI requirements will apply to the BOCs.[179]

122. In contrast to the BOCs, AT&T argues strenuously that it should not be subject to any CEI requirements. It claims that since it does not possess bottleneck facilities, which it defines as facilities that cannot be duplicated feasibly by others, imposition of CEI on it would be inappropriate. AT&T states that it can provide no capabilities to its competitors that they cannot provide for themselves or obtain under existing tariffs and claims that it does not own any facilities that enhanced service providers must use to offer their services. AT&T claims that a CEI obligation on it merely would encourage the development of duplicative services

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[178] Lee Reply Comments at 43.

[179] The parties that are critical of the CEI proposals in the *Notice*, such as MCI and Lee, also assume that if adopted, CEI would apply to the BOCs.

rather than innovative ones. AT&T further argues that CEI for its network facilities is impractical because if imposed, the CEI requirement would affect only the small portion of total traffic that is both interLATA and handled by AT&T. Finally, AT&T contends that it does not possess the line-status information needed by providers of enhanced services, because such information is generated in local exchange central offices.[180]

123. Several commenters sharply oppose AT&T's position on CEI. For example, Gannett contends that AT&T possesses substantial market power that fully justifies the imposition of CEI. Bell Atlantic argues that there is no reason for AT&T to be treated differently than the BOCs with regard to any CEI requirement, since "AT&T, with its dominance of the interexchange market, is no less a 'bottleneck' in its market than the BOCs are in theirs."[181] IBM and API, which support the imposition of CEI on all "dominant carriers" upon the removal of structural separation, would include AT&T in that category. RCA argues that even if for technical reasons, CEI does not apply to AT&T in exactly the same way as it applies to the BOCs, AT&T should still be subject to a requirement that it provide competitors with access to its facilities equal to the access provided to its own enhanced services. RCA views AT&T's continuing market dominance and control as requiring such regulations.

(b) Application to the Independents.

124. While Independents are not subject to structural separation requirements,[182] a number of commenters argue that they should be subject to CEI as a precondition to their participation in enhanced services markets. As we have noted, IBM and others

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[180] According to AT&T, this information includes:

> Supervisory signals (*e.g.*, seizure, answer, hang up and disconnect); full called and calling number identification; billing number; busy/idle status of the customer loop; on hook/off hook status of individual customer loops; and altering signals (such as a stutter dial tone or visual indication on the customer's CPE) to inform the customer to contact the enhanced services provider. This information is vital to enhanced services, such as Custom Calling II, which build upon the capabilities of the basic local network.

AT&T Comments at 34.

[181] Bell Atlantic Reply Comments at 8 n. 13.

[182] We do require Independents to keep books of account for their unregulated activities that are separate from those for their regulated operations. *See* Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced SErvices (Second Computer Inquiry), *Fifth Report and Order*, CC Docket No. 81-893, 49 Fed. Reg. 46378 (November 26, 1984) *reconsideration pending (Fifth Report)*.

support a CEI requirement for all dominant carriers, which would include the Independents as well as the BOCs and AT&T, because of the ability of such carriers to discriminate against competitors. Independents such as Anchorage Telephone and SNET support CEI requirements for all dominant carriers, provided those requirements do not disable carriers from recovering the costs of CEI or realizing the efficiencies of integrating basic and enhanced services. Other Independents, such as UTS, do not oppose CEI requirements, but call for the Commission to permit carriers to integrate facilities whenever such integration is in the public interest, even if CEI is not feasible. USTA, although generally opposing additional regulation of the Independents, supports the imposition of CEI or collocation on a case-by-case basis, with the goal of maximizing system efficiencies rather than protecting competition.

125. In contrast, some Independents, such as GTE, Continental, CP National, and Taconic *et al.*, oppose the imposition of CEI requirements on them. They claim that any new or additional regulations applicable to their attempts to offer enhanced services would unduly burden them and harm the development of innovative offerings.[183]

126. Several commenters, assuming that Independents may be subject to CEI restrictions, make specific suggestions regarding the implementation of CEI for small Independents. For example, Dobson/Fort Bend contends that small Independents should be subjected to a CEI obligation analogous to the equal access obligations for interexchange services that we have imposed on the Independents,[184] *i.e.*, small Independents should be required to provide CEI only from end offices equipped with stored-program-controlled switches and then only upon receipt of a specific request for CEI from an enhanced service provider. CSEPA/NBFAA, an association of alarm service providers, makes a similar argument. ALLTEL, an Independent holding company, proposes an objective criterion for CEI regulation; contending that if a carrier serves less than 35,000 lines, it should be able to provide integrated enhanced services from its central office without a CEI requirement, subject only to accounting regulation.

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[183] *See, e.g.*, GTE Comments at 30; Continental Comments at 24; CP National Comments at 8; Taconic *et al.* Comments at 18-19; and OPASTCO/NCTA Comments at 12.

[184] MTS and WATS Market Structure Phase III, *Report and Order*, CC Docket No. 78-72, Phase III, 50 Fed. Reg. 15547 (April 19, 1985).

(2) Discussion.

(a) Application to the BOCs and AT&T.

127. As an initial matter, while we are deferring to the *Supplemental Notice* the question of the application of CEI requirements to the Independents (as discussed below), we consider it appropriate to address in this *Order* other CEI issues raised in the *Notice* and debated in the record. The comments we have received to date recognize the importance of our CEI proposals and address them in detail and at length. We have made full use of the concepts and criticisms contained in the record to develop the detailed CEI and Open Network Architecture requirements discussed below. Moreover, our requirements for the filing and review of CEI and Open Network Architecture Plans will enable the enhanced services industry to gain experience with these requirements in a systematic way.

128. The CEI requirements we proposed in the *Notice* were designed to serve the dual goals of permitting carriers to make enhanced services available to the public in the most efficient manner possible, while promoting the continued development of competition in the enhanced services marketplace. The achievement of the latter goal could be jeopardized if, in furtherance of the former goal, a carrier were permitted to offer an efficient enhanced service integrated with its basic network facilities, while withholding from its competitors the opportunity to interconnect similar services with its network on a comparably efficient basis. The proposed CEI requirements were designed to prevent carriers from engaging in such conduct, which could unnecessarily reduce the opportunities for non-carriers to participate in the enhanced services marketplace and thereby deprive the public of the full benefits of competition in this area.

129. Our analysis of the BOCs' position in telecommunications markets leads us to apply the CEI requirement to them. We have noted that the BOCs possess local network facilities that, although increasingly subject to bypass by alternative local access technologies, still possess substantial market power in providing network access for most end users other than large companies. Furthermore, there is virtually universal support in the record for applying CEI to the BOCs. Accordingly, we find that CEI requirements are necessary for the BOCs.

130. We recognize that AT&T is increasingly subject to competition in the markets for its regulated offerings. Unlike the BOCs, it does not possess significant legally-protected monopoly facili-

ties. However, we find that AT&T's presence is still sufficiently strong in interexchange basic service markets, and particularly in certain key areas such as those for interexchange basic service and terrestrial private lines, that there is a substantial likelihood that AT&T offerings of integrated enhanced services could result in the distortions to competition and the loss of efficiency that CEI is designed to prevent. Accordingly, we conclude that CEI requirements should apply to AT&T. We recognize, of course, that the technical characteristics and implementation of such requirements may differ from those applicable to the BOCs, and we have designed these requirements with sufficient flexibility to account for such differences.

131. We conclude that AT&T and the BOCs must satisfy the CEI requirements for any particular enhanced service they wish to offer on an unseparated basis. We have designed the CEI requirements to control potential discrimination against competitive enhanced service providers by ensuring that the BOCs and AT&T provide these competitors with access to basic services that is comparable in efficiency to the access they provide their own enhanced services. The efficacy of CEI requirements in preventing discrimination is a key element in our conclusion that structural separation for AT&T and the BOCs should be eliminated. Although we have determined that there have been substantial decreases in the opportunities of AT&T and the BOCs to act anticompetitively in the enhanced service marketplace, we conclude that some potential for such problems continues to exist. Moreover, we perceive substantial benefits to the public in providing incentives for these carriers to develop and implement CEI (and eventually Open Network Architecture) as early as possible. Accordingly, adherence to the CEI requirements established in this *Order* will be a necessary predicate to structural relief for provision by AT&T and the BOCs of specific enhanced services.

(b) Application to the Independents.

132. While we find that "dominant" carriers with market power in the provision of basic services, including the Independents, could engage in the discriminatory practices against enhanced service competitors that CEI is designed to prevent, we limit the applicability of CEI and Open Network Architecture requirements to AT&T and the BOCs in this *Order*. We consider the applicability of those requirements to the Independents in the *Supplemen-*

tal Notice[185] As we explain further in the *Supplemental Notice*, it is our tentative view that as a general principle, CEI should be applied to all telephone companies that control bottleneck facilities. On the other hand, we recognize that there are countervailing considerations that might render such a requirement inappropriate for all, or at least some, Independents. First, we recognize the diversity of the areas served by the Independents, which range from densely populated urban centers to rural, lightly developed districts. As a result, the competitive nature of the markets served by these carriers also varies. In urban areas, the enhanced services markets may be highly competitive, and a CEI requirement may be appropriate to maximize the efficiency and competitiveness of these markets. In rural areas, there may be insufficient demand to support any enhanced service providers other than the region's Independent telephone company, and a CEI requirement would have no effect other than increasing the cost of the services. Second, we also recognize the great diversity in the size and financial resources of the Independents, which range from diversified telecommunications firms with billions of dollars in assets and revenues and access to the most advanced technology, to very small telephone companies serving a hundred or fewer access lines with relatively unsophisticated equipment.[186] Third, we have not subjected any of the Independents' enhanced services operations to structural separation in the past.[187] We recognize that imposition of CEI requirements may subject Independents to some additional regulatory burdens, although the extent of such burdens remains unclear. Before imposing such requirements on the Independents, we want to be sure that by doing so we neither discourage carriers from offering new enhanced services because of increased regulation, nor cause existing services to be discontinued. In this regard, we find that the existing record in this proceeding is inadequate to resolve these questions. While we have received instructive comments on general aspects of these issues, most parties naturally devoted their attention to the application of CEI to the BOCs and AT&T. In the *Supplemental Notice*, we seek development of a more focused record on the CEI issues specifically relevant to Independents.

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[185] *See Supplemental Notice* at paras. 60–68.

[186] *See BOC Structural Relief Notice* at para. 58.

[187] In the *Final Decision* we imposed structural separation on GTE as well as AT&T, but we removed those requirements in the *Reconsideration Order*. *See supra* note 2.

b. CEI Standards and Parameters.

133. A fundamental issue in defining CEI as a nonstructural safeguard is identifying the general standard that the Commission should require carriers to satisfy in providing CEI arrangements. The *Notice* alluded to two possible standards — "identical" interconnection and "roughly comparable" interconnection.

134. One form of "identical" interconnection considered in the *Notice* with obvious potential efficiency benefits, is the collocation of enhanced service providers' equipment with carriers' basic facilities. Such collocation could virtually eliminate the differences in transmission costs incurred by the carrier and its competitors in providing enhanced services that might otherwise occur if the carrier collocated its enhanced and basic service facilities. In the *Notice*, we acknowledged that the carriers traditionally opposed such collocation, based on concerns of potential administrative, operational, and security problems at their facilities. However, we noted that problems such as lack of space at carrier facilities may be lessening, and that many other potential problems might be resolved by contract between the carrier and others. Accordingly, in the *Notice* we invited parties to provide information on general industry experience with similar types of collocation and asked for comment on whether we should establish a "mandatory collocation" requirement, *i.e.*, whether we should condition the grant of structural relief for the enhanced service offerings of AT&T and the BOCs on their making collocation opportunities available to others on a space-available basis.[188]

135. However, the *Notice* indicated that because a carrier might be able to build an enhanced service into basic service hardware or software, it may be infeasible to make "identical" interconnection available to others with separately housed facilities. Accordingly, the *Notice* suggested that "rough comparability" of interconnection, based on some degree of pricing and functional comparability, may suffice as a standard in place of an "identical" interconnection standard. The comparability standard would permit carriers to offer precisely those unique integrated enhanced services that may present efficiencies that cannot be duplicated.[189] Moreover, the *Notice* requested comment on how we should assess whether carriers have met the CEI standards we adopt. Accordingly, in this *Order* we establish both a general standard for CEI

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[188] *Notice* at paras. 126, 128–29.
[189] *Notice* at para. 123.

and specific parameters by which we will measure carriers' compliance with that standard.

(1) Positions of the Parties.

(a) General CEI Standard.

136. The commenters that consider this issue support variants of the two standards suggested in the *Notice*. A significant number of commenters support forms of an "equal access" standard for CEI that is closely related to the "identical" interconnection of standard of the *Notice*. Generally, such commenters contend that the access to basic services a carrier makes available to its enhanced service competitors should be equal in functionality and price to the access it provides its own enhanced service operations.[190] They generally argue that this standard is the only practical means of preventing potential discrimination by the carrier and of preserving competition in many enhanced service markets because "rough comparability" or similar standards are difficult to evaluate and enforce. They claim that such equality is achievable for the vast majority of enhanced services, including those that a carrier could integrate into its basic facilities.

137. Even among the parties supporting an "equal access" model for CEI, however, there are significant differences as to what constitutes such access. Commenters such as DOJ, ADAPSO, IDCMA, Honeywell, and RCA, while supporting collocation as one means of implementing an "equality" or "equal access" standard for CEI, emphasize that an equal access standard applied to key technical, operational, and price characteristics of underlying basic services may be a feasible alternative to mandatory collocation. IBM explicitly calls for CEI to utilize an "equal access" standard patterned after the equal access requirements for inter-LATA services the *MFJ* imposes on the BOCs.[191] Some of these parties also would allow a carrier to be relieved of its CEI obligations for a particular service if it could demonstrate, after public comment, that equal access for that service was economically impractical. For example, under IBM's approach, if the carrier sustains such a showing, it still would be required to provide the most economically comparable form of interconnection suitable for competitive access to the network. Similarly, DOJ advocates an equal interconnection standard for CEI that requires

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[190] We discuss pricing of CEI *infra* at paras. 167-186.
[191] *MFJ*, 552 F.Supp. at 227, § II(A).

the carrier to provide equality to competitors in several key aspects of CEI. However, DOJ's plan also provides that a carrier may not be required to offer equal interconnection if it makes "a particularized and convincing showing that equal interconnection could be achieved only by sacrificing significant efficiencies of integration within the network."[192] Tymnet, CSEPA/NBFAA, and other enhanced service providers argue for mandatory collocation as the best implementation of "identical" interconnection. User groups, including API, ADCU, and AAR, also support mandatory collocation for similar reasons.

138. In contrast to the proponents of "equal access," many carriers support a "rough comparability" standard.[193] Their principal stated concern is that an "equal access" or "identical" CEI standard will limit the potential efficiencies that can be realized from integrating enhanced services into basic facilities. If, because of the nature of such integration, interconnection to other facilities cannot be provided on an equal basis, an "equal access" or "identical" CEI standard would preclude such services from being offered, even if they are highly efficient. For example, Bell Atlantic contends that it should be permitted to optimize its services to meet the needs of customers "at the lowest possible price without dissipating the efficiencies of providing such services through the network, even if competing service vendors are unable to obtain comparably efficient interconnection as a result."[194] In addition, these commenters argue that because of the many varieties of enhanced services that possibly can be offered, an "equal access" standard may not be sufficiently flexible. Accordingly, they assert that a key aspect of the "rough comparability" standard is whether a given type of interconnection is "technically feasible,"[195] although they differ on whether the Commission, the carrier, or the third party desiring interconnection should determine such feasibility. Indeed, some commenters propose placing the burden of proof on the party desiring interconnection to establish that comparable interconnection is technically feasible.[196]

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[192] DOG Reply Comments at 12–13.

[193] *See, e.g.*, PacTel Comments at 16; NYNEX Comments at 18–20, App. D–1; BellSouth Comments at 45 (distinguishing CEI from "identical" interconnection); Bell Atlantic Comments at 17; SNET Comments at 17–18.

[194] Bell Atlantic Comments at 17.

[195] *Id.*; *see also* US West Comments at 73.

[196] *See, e.g.*, USTA Comments at 57–58; SNET Comments at 17–18.

(b) Collocation.

139. While several BOCs view collocation as a form of CEI that may be appropriate in some circumstances, they all argue strongly against a mandatory collocation requirement. Ameritech claims that such a requirement would be a regulatory intrusion that could "entangle the Commission in business judgment questions that it has heretofore avoided."[197] Ameritech also states, however, that collocation may be a suitable CEI solution for some carriers in particular situations.[198] Bell Atlantic agrees and supports collocation as one option that should be available to the BOCs in providing CEI for a particular service. BellSouth, in opposing mandatory collocation, focuses on the lack of available space in its central offices. NYNEX says that the lack of space available for collocation could make it the target of discrimination and other antitrust claims, and also cites problems involving security, expansion, maintenance, and space allocation. It claims that the cost advantage available from collocation may be only nine percent of total costs and that the disadvantages of collocation outweigh these advantages.[199] PacTel opposes mandatory collocation as being less beneficial to the public than other forms of CEI and argues that because of limited space in its facilities, a mandatory collocation requirement could disadvantage competitors that do not secure such space. Southwestern Bell, while strongly arguing against mandatory collocation or other mandatory forms of CEI, views collocation as a viable means of providing CEI and states its intention to conduct a collocation trial with interested outside vendors. It states its belief that lease arrangements can address the operational and administrative difficulties mentioned by the other BOCs, although it emphasizes that different services may require different forms of regulatory treatment. US West argues that while collocation may be a reasonable form of "open architecture" in some conditions, mandatory collocation is too limited a solution to the CEI issue. US West notes that one of its subsidiaries, Northwestern Bell Telephone Company, has adopted a collocation policy based on contractual arrangements with the collocating party.

140. Other carriers also oppose mandatory collocation. AT&T opposes mandatory collocation because of possible administrative difficulties, although it notes that it offers collocation on a

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[197] Ameritech Comments at 43-44 n. 45.

[198] *Id.*

[199] NYNEX Comments at D-8.

contractual basis for limited purposes. GTE, Cincinnati Bell, and Anchorage Telephone cite the numerous practical problems that mandatory collocation could cause. Continental, while noting that it provides collocation in some areas where it is administratively feasible to do so, opposes any general collocation requirement for the Independents. CP National claims that mandatory collocation could be an unconstitutional taking of local exchange property, although it supports permitting carriers to provide collocation on a contractual basis.

141. In contrast, numerous enhanced service providers, user groups, and trade associations support mandatory collocation. For example, CompuServe, an enhanced service provider, argues that mandatory collocation is justified because carriers should not have special advantages in utilizing their monopoly facilities. ADCU, a user group, contends that a mandatory collocation requirement would further the Commission's procompetitive policies in the enhanced services area. CSEPA/NBFAA argues that collocation should be required in order to maximize efficiency and that objecting carriers should be required to explain why collocation is not feasible at any given central office. Similarly, DOJ views collocation of the enhanced services facilities of the carrier and its competitors as the surest way to foster connection equality and supports placing the burden of proof on carriers to justify why such collocation is not possible. However, DOJ notes that collocation may not be the only efficient form of equal connection. ADAPSO contends that ultimately a carrier should be required to provide enhanced service competitors with collocation whenever the carrier offers an enhanced service using equipment collocated in its central office. ADAPSO treats collocation as the standard by which other forms of CEI should be evaluated, arguing that collocation permits others to share in efficiencies and will benefit both carriers and users. It argues that its overseas members have had significant experience in collocating their equipment with foreign carriers and have overcome the practical problems of collocation through contractual agreements.[200] Tymnet supports mandatory collocation as the best way to remedy the competitive imbalances it asserts will result if the Commission eliminates the structural separation requirements.

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[200] In this regard, RCA states that its experience with the collocation of domestic and international satellite earth stations demonstrates that satisfactory collocation can be achieved.

(c) CEI Parameters.

142. Several parties discuss the specific interconnection parameters that should be evaluated to determine whether carriers have adequately fulfilled the CEI standards. The commenters focus on two dimensions of CEI: functionality and the price of the interconnection provided. For example, GTE discusses "parity of technical quality" and "price parity."[201] Similarly, DOJ's equal interconnection proposal sets out several elements that address both functional elements and price.[202] We consider CEI functional parameters here and address CEI pricing issues in a later section of this *Order*.[203]

143. GTE, which supports equal technical performance as a requirement of CEI, specifies that equality must be provided in several areas, including transmission characteristics, such as bandwidth; transmission quality, as measured by bit error rate and delay distortion; and service reliability, expressed in terms of standard measures, such as mean time between failures and installation intervals, for new service orders.[204] In this connection, CompuServe emphasizes its dependence on the availability of high-quality digital transmission in any interconnection arrangement.[205]

144. ADAPSO discusses similar functional measures for which it contends equality must be provided, including response time in electronic switching or interconnection, flexibility of interconnection, line quality, geographic availability, and position in the network switching hierarchy. With respect to this last parameter, ADAPSO argues that in the planned ISDN environment, enhanced service providers should have equal access to the so-called "D" channel, which is designed for signaling, if the carrier uses that channel to provide a packet-switched basic service.[206] IBM advocates equality in functional parameters, such as trunk-side interconnection to the carrier's switches and access to signaling information; use of loop multiplexing to minimize the loops needed

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[201] GTE Comments at 42, 44.

[202] According to DOJ, our CEI standards should incorporate the following three requirements. First, all connections must be technically equal. Second, the equal connections must be provided under unbundled tariffs priced equally for the dominant carrier and others. Third, the location of the point of interconnection must not put competitors at a disadvantage. DOJ Reply Comments at 8-11.

[203] *See infra* Section IV.B.1.c.

[204] GTE Comments at 44-45.

[205] CompuServe Reply Comments at 20.

[206] *See Notice* at para. 132.

by enhanced service competitors; and the addressing scheme for both the carrier's enhanced services and its competitors. IBM also advocates equal access to the "D" channel in an ISDN environment. BellSouth lists a set of principles that it asserts should govern the determination of whether a carrier is providing CEI. The principles encompass unbundling, resale, pricing, end-user access, feature comparability, feature transparency, and interface specification aspects of CEI.[207] With respect to unbundling, BellSouth would require the basic services offered to competitors to be "unbundled in sufficient increments so that competitors can reasonably accommodate their marketplace purposes, but such unbundling should not be artificially exaggerated."[208] BellSouth's resale principle would require that prices of carrier-provided enhanced services include the tariffed prices of the underlying basic services. Such principles, while not of a technical nature, do address the functional issues of defining a CEI requirement.

145. BellSouth also argues that, as a transitional measure, CEI offerings should be confined to vendors that compete with a carrier in offering an enhanced service. Otherwise, it argues, CEI could aggravate the problems of tariff shopping or service bypass, and could be used by interexchange carriers, resellers, and others to avoid NTS cost contributions that existing services provide. However, a number of user groups, including IDCMA, API, CCTU, and TCA, argue that CEI should be available to end-users as well as to enhanced services vendors. They note the utility of CEI for large users seeking to design private data networks, and they compare the ability of end-users to obtain CEI to their ability to interconnect CPE to the public switched network.

146. Finally, IBM, PacTel, and Tymnet, acting as a task force on CEI (the Task Force on CEI) and filing informal comments, discuss pricing and functional principles, including unbundling, transparency to users, choice to users, availability of information, timing of the CEI offering, availability of the ISDN "D" Channel, and new services designs.[209]

(2) Discussion

(a) Equal Access Standard.

147. We conclude that carriers to which the CEI requirement

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[207] *See* BellSouth Reply Comments at 21-23.

[208] *Id.* at 21-22; *see also* PacTel Comments at 29.

[209] *See* Recommendations of the Task Force on CEI (IBM, PacTel, and Tymnet), filed March 25, 1985.

applies must provide interconnection opportunities to others on an "equal access" basis. We encourage the carriers, in offering enhanced services utilizing basic network facilities, to devise the most technically efficient and the lowest-cost means of implementing such services. We do not seek to constrain the technical methods or implementations that carriers may use to realize such efficiencies. In general, however, we require the basic service functions utilized by a carrier-provided enhanced service to be available to others on an unbundled basis, with technical specifications, functional capabilities, and other quality and operational characteristics, such as installation and maintenance times, equal to those provided to the carrier's enhanced services.[210] Further, we require carriers to minimize interconnection costs for other providers either by adopting a collocation policy or by providing the most efficient available means of concentrating traffic, such as loop or trunk multiplexing, so long as it does not discriminate either against or among other providers in so doing.

148. We find that this equal access standard for CEI will best serve the public interest for several reasons. An equal access standard most clearly advances our policy that basic facilities be available on the same terms to all participants in the enhanced services marketplace. We have long recognized that the basic network is a unique national resource, and our policies have been designed to promote nondiscriminatory utilization of that resource's capabilities. The structural separation requirements sought to achieve this goal by physically and organizationally separating the carrier's enhanced services subsidiary from its basic operations. In essence, this separation placed the subsidiary and all other enhanced service providers on an equal relationship with the carrier's basic operations. As we have noted, a byproduct of this arrangement was the foreclosure of possible efficiencies from integrating enhanced and basic operations. In adopting an equal access standard for CEI while removing structural separation, we will best preserve our nondiscriminatory policies while promoting efficiency.

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[210] We recognize that exact equality, in the sense that the parameters of every installation of a given type of basic service are precisely identical to those of every other installation, is unachieveable, since some minor variations occur even among carriers' own installations of such services. We require "equality", when used within the context of CEI, to mean that variations in the CEI parameters of the basic services offered to competing enhanced service providers, should be no greater than those of the basic services used by a carrier in conjunction with its enhanced service offerings. We will view any systematic differences between a carrier and its competitors in such variations as inconsistent with this equal access standard.

149. We also find that our equal access standard will increase the public welfare by maximizing the availability of enhanced services to the public. Based on the record in this proceeding, we conclude that carriers can offer equal interconnection opportunities for the vast majority of enhanced services that can be integrated into basic facilities. Such opportunities will promote competition in the provision of enhanced services and, accordingly, will increase the use and availability of such services. Because CEI and our other nonstructural safeguards will permit carriers such as AT&T and the BOCs to participate in these markets on an unseparated basis, such carriers will be motivated to provide integrated services that best serve market needs. Because CEI that is based on an equal access standard will permit a carrier's competitors to utilize the same network services, competition will focus on the innovative, value-added features of the various enhanced services being offered.

150. While some carriers advocate "comparability" or "rough comparability" standards on the grounds that these standards would permit them to offer unique, maximally efficient enhanced offerings, we conclude that the difficulties with such approaches outweigh their benefits. The "comparability" or "rough comparability" standards reduce carrier incentives to develop truly equal forms of interconnection for enhanced services. In addition, a significant potential for discrimination remains under such standards because of their intrinsic discretionary nature. The equal access standard is simpler to enforce than these discretionary standards particularly with regard to measurable quantities such as installation and repair times, technical specifications, and functional capabilities. Thus, in attempting to enforce "rough comparability" standards, we and industry participants, including carriers and enhanced service providers, could become involved in another regulatory quagmire of *ad hoc* analysis, which an equal access standard may avoid by establishing criteria that can be subject to a more objective analysis.

(b) Collocation.

151. We recognize that collocation is a possible way of fulfilling the goals of our equal access standards for CEI. However, we decline to mandate that carriers provide collocation opportunities for other enhanced services providers. Rather, we encourage carriers to utilize collocation techniques as an option in satisfying our general CEI standards.

152. We can not conclude that, for all enhanced services and in all situations, collocation is the most efficient form of equal access available for CEI. While it is an obvious way to reduce the transmission costs that an enhanced services provider might otherwise incur if its facilities are not collocated, other ways to minimize such costs may exist that could be more cost-effective. Both supporters and opponents of mandatory collocation acknowledge that significant issues exist in implementing collocation, particularly with regard to space availability, security, operations, and maintenance. While such issues may be capable of resolution in some cases, in many others the costs of resolving such issues may offset whatever savings in transmission costs accrue from collocation. We find the space-availability issue particularly troubling, since in a competitive enhanced services market the demand for space in which to collocate may well outstrip the supply. This could be particularly true in urban areas, where available office space may be scarce and the enhanced services market may be quite active. Although carriers could develop a number of methods to allocate available space, including conducting auctions or lotteries, these approaches also raise difficult issues as means of implementing CEI.

153. We also agree with the commenters that argue that other, more efficient CEI methods may be available. Indeed, our CEI standard calling for equal functionality and the specific CEI parameters that we discuss below provide a general framework within which such efficient forms of CEI may be developed. We note ADAPSO's contention that a form of CEI other than collocation may be necessary to provide equal interconnection when a carrier's enhanced service offering is physically integrated within its basic facilities. Indeed, because collocation merely reduces transmission costs, it does not address the more general issues of equal functionality with regard to CEI. As with our decisions to eliminate structural separation because of the limitations it places on efficient use of network facilities by carrier-provided enhanced services, we decline to mandate collocation which would limit the development of more efficient forms of CEI. In this regard, we are encouraged by the work of Ameritech, in developing its FN/SI[211] technology, and Northern Telecom, in developing its Dynamic Network Architecture. We do not wish to chill the development of such technologies by an overly restrictive approach to CEI such as mandatory collocation.

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[211] *See infra* para. 204.

(c) CEI Parameters.

154. In devising the following equal access parameters, our baseline objective is to ensure that the basic services available to a carrier's enhanced services are available to other enhanced service providers in an equally efficient manner. We have also taken care to design these parameters so that the carriers subject to them can satisfy them in a flexible manner, consonant with the particular services at issue.

155. Although we require compliance with the equal access parameters for CEI, we recognize the validity of DOJ's comments to the effect that in exceptional cases, a carrier may be able to provide a particular service on an integrated basis only in a manner that prevents it from fulfilling all such parameters. We expect such instances to be rare. However, in such a case, we require the carrier to include in its CEI Plan a detailed explanation of exactly which equal access parameter cannot be satisfied and why. We further require it to present an alternative proposal to fulfill the requirement at issue in a manner minimally different from that required. We will subject such an alternative proposal to careful scrutiny as well as to public comment.

156. Because CEI, as a form of interconnection, makes basic network facilities and services available to the public, it is a basic service itself and is subject to regulation as such on both the state and federal levels. Following the approach we adopted in the *Asynchronous/X.25 Waiver Order*,[212] we require all CEI offerings to satisfy the following requirements, but we reach no conclusions and adopt no conditions on the rate levels carriers may propose for such offerings.

157. *Interface Functionality*. As part of its CEI offering, the carrier must make available standardized hardware and software interfaces that are able to support transmission, switching, and signaling functions identical to those utilized in the enhanced service provided by the carrier.[213] Information and technical specifications for such interfaces must be available according to the network information disclosure requirements set forth herein.[214]

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[212] *Asynchronous/X.25 Waiver Order*, 100 FCC 2d at 1106–1107, paras. 121–22.

[213] As an example, trunk-side connections should be made available if the carrier uses such connections (or their functional equivalents) in providing an enhanced service.

[214] *See infra* paras. 250–55.

158. *Unbundling of Basic Services.* As part of its CEI offering, the basic services and basic service functions that underlie the carrier's enhanced service offering must be unbundled from other basic service offerings and associated with a specific rate element in the CEI tariff. Information utilized by the carrier in providing the unbundled basic services, such as calling number identification, that is not proprietary to its customers, must be made available as part of CEI. Moreover, any options that are available to a carrier in the provision of such services or functions also must be included in the unbundled offerings.[215] All basic network capabilities utilized by the carrier's enhanced service offerings, including signaling, switching, billing and network management, are subject to this unbundling requirement.[216] We emphasize that the carrier must provide such unbundled basic services to others in a form unaffected by the carrier's enhanced services operation, so that competitors can utilize such services without distortion or degradation caused by the carrier's use of them. If such degradation is unavoidable, the carrier must charge its enhanced services operations an additional Network Utilization Rate Element for the degraded basic services, as required for the unseparated offering of certain protocol conversion services in the *Asynchronous/X.25 Waiver Order.*[217]

159. *Resale.* We require the carrier's enhanced service operations to take the basic services used in its enhanced service offerings at their unbundled tariffed rates as a means of preventing improper cost-shifting to regulated operations and anticompetitive pricing in unregulated markets.[218]

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[215] For example, if a carrier's enhanced service utilizes digital transmission, supervisory signaling, calling number identification, and a special alert signal, such as a stutter dial tone, CEI for that service should include these basic services as a set unbundled from all other basic offerings. Continuing the example, if a carrier offers an option of a stutter dial tone or a signal to a visual indicator on the customer's CPE, CEI for that service would be required to provide such an option as well.

[216] While a carrier need not, under our CEI requirements, provide unbundled basic service elements not employed by its enhanced service operations, if the implementation of Open Network Architecture does not take place within the time frame contemplated in this *Order*, we would consider whether to establish a requirement that carriers honor reasonable requests for such elements from enhanced service providers or users.

[217] *Asynchronous/X.25 Waiver Order*, 100 FCC 2d at 1107-1109, paras. 124-128. Our determination that a NURE is necessary for asynchronous/X.25 protocol conversion is unchanged by this requirement. *See* paras. 34-35.

[218] Because we believe that this requirement can be satisfied using accounting techniques, see *infra* paras. 234-40 we do not require that a carrier locate its enhanced services operations in a corporate entity separate from that of its basic services operations.

160. *Technical Characteristics.* As part of its CEI offering to enhanced service competitors, a carrier must provide basic services with technical characteristics that are equal to those of the basic services it utilizes for its own enhanced services. Such characteristics include, but are not limited to: transmission parameters, such as bandwidth and bit rates; quality, such as bit error rate and delay distortions; and reliability, such as mean time between failures.

161. *Installation, Maintenance and Repair.* The time periods for installation, maintenance, and repair of the basic services and facilities included in a CEI offering must be the same as those the carrier provides to its own enhanced service operations. In Paragraphs 192–193, we discuss the reporting and other requirements that carriers must satisfy to show that they have met this requirement.

162. *End-User Access.* If a carrier offers end-users the ability to use abbreviated dialing or signaling to activate or access the carrier's enhanced offerings, it must provide, as part of its CEI offering the same capabilities to end-users of all enhanced services that utilize the carrier's facilities. Similarly, end-users should have equal opportunities to access basic facilities through derived channels, such as Data-Over-Voice offerings, whether they use the enhanced service offerings of the carrier or those of a competitor to do so.

163. *CEI Availability.* A carrier's CEI offering must be fully operational and available on the date that it offers its corresponding enhanced service to the public. In addition, the carrier must specify a reasonable time prior to this date during which prospective users of CEI, such as enhanced services competitors, can utilize the CEI facilities and services for purposes of testing their enhanced service offerings. This testing opportunity must be provided early enough to ensure a reasonable opportunity for resolution of technical problems. This requirement is necessary to balance the conflicting interests of the carrier, which should have a reasonable period to develop, test, and "de-bug" its CEI offerings before making them publicly available, and other CEI users, such as competitors, that might suffer an unfair competitive disadvantage if carriers were able to test and perfect their enhanced services — particularly, their interconnection with the underlying basic facilities — while withholding those same basic facilities from others.

164. *Minimization of Transport Costs.* We recognize that carriers may reduce or eliminate certain equipment and transmission costs by collocating or integrating enhanced services facilities with their basic network facilities. In contrast, competitors that also offer enhanced services utilizing network facilities necessarily will incur additional equipment costs for cabling and associated equipment, unless they are permitted to collocate or integrate their facilities as well. While we do not impose mandatory collocation requirements on carriers subject to CEI, we do require such carriers to provide others with interconnection facilities that minimize such transport costs. Loop or trunk multiplexing is one technique for minimizing such costs. A collocation policy voluntarily adopted by a carrier is another option. We require carriers to demonstrate in their CEI Plans what steps they will take to reduce transport costs for competitors. We further direct such carriers to work with CEI subscribers in good faith to develop techniques to minimize such costs.[219]

165. *Recipients of CEI.* Carriers should not restrict the availability of CEI to any particular class of customer or enhanced service competitor. Both enhanced services vendors and large users are, in a sense, competitors of the carriers in enhanced services markets. To restrict availability of CEI to one or another class of such competitors would be to condone the anticompetitive discrimination that we seek to prevent using CEI. While there may be some possibility of uneconomic effects if unbundled CEI services are utilized in markets other than for enhanced services, we find such possibilities to be extremely speculative compared with the certain discrimination that would occur if we restricted CEI availability only to enhanced services vendors. In requiring CEI to be generally available, we shall continue to evaluate the effects of such availability on markets other than for enhanced services, and we encourage the carriers and other affected parties to bring such effects to our attention as CEI and Open Network Architectures are implemented.

166. We expect carriers subject to the CEI requirements to satisfy all these conditions in offering on an unseparated basis any enhanced service that utilizes their basic facilities. As set forth more fully below (*infra* paras. 190-191) before AT&T and the BOCs offer any such enhanced service they must submit a CEI Plan addressing all of these conditions that will be subject to

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[219] Carriers, of course, may not discriminate among competitors or other CEI subscribers in implementing such a collocation or cost-minimization scheme.

public comment and Commission review.[220]

c. *CEI Pricing.*

167. Our CEI proposals in the *Notice* emphasized our policy goal of maximizing efficiencies in the enhanced services available to the public and mentioned the impact of CEI pricing in

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[220] If a carrier's enhanced service is offered from a facility that is not collocated with its basic network facilities, but connects to the network through a standard interface and standard transport facilities that are available to the public under tariff, compliance with the CEI requirements is relatively simple.

Having established that the Bureau's granting of the waiver requested in the *AT&T Limited Relief Order* did not prejudge the outcome of this proceeding, we deny the Applications for Review of that order, *supra* note 92, filed by GTE and ADAPSO. We find that the Chief of the Bureau properly granted a limited and temporary waiver of the *Computer II* structural separation requirements for those enhanced services provided by AT&T that, among other things, are provided through facilities not collocated with AT&T basic facilities and take their underlying basic services under general tariffs and through standard interfaces available to the general public (the Waived Services). We explicitly declined on procedural grounds to consider structural relief for such services in the proceeding culminating in the *AT&T Structural Relief Order*, which dealt solely with CPE so that, contrary to the arguments of the parties seeking review, the relief requested in AT&T's waiver petition had not already been denied in that proceeding. We find that the Bureau's analysis that, for regulatory purposes, the Waived Services could be treated as CPE, is appropriate given the limitations and restrictions that it imposed in defining the Waived Services. We also find that this waiver serves the public interest by eliminating the potential for inefficiencies caused by unnecessary regulation in the organization of AT&T's CPE and enhanced services operations caused by the *AT&T Structural Relief Order*. Furthermore, since the waiver granted was both temporary, pending resolution of this proceeding, and limited in scope, it did not prejudge the outcome of this *Order*, a fact demonstrated by our conclusion that general structural relief for the provision of enhanced services by AT&T and the BOCs will occur only after the implementation of comprehensive nonstructural safeguards, including CEI. For similar reasons, the waiver did not eviscerate the *Computer II* structural separation rules.

We temporarily extend the term of the waiver granted in the *AT&T Limited Waiver Order* until AT&T implements either an approved CEI Plan for those services, which would permit it to offer them on a collocated basis, or an approved Open Network Architecture Plan and other final nonstructural safeguards, at which time the waiver will be mooted. So long as the services are not reconfigured so as to be integrated with AT&T network facilities, the conditions of the waiver appear largely to fulfill our CEI requirements, and we consider that the other nonstructural safeguards imposed by the terms of the waiver are adequate to satisfy our concerns regarding potential anticompetitive behavior for the relatively short, additional time of extension. The waiver applies (with slight variations) the nonstructural safeguards of the *AT&T Structural Relief Order* to the Waived Services, in light of their functional equivalence to CPE. Accordingly, if those safeguards are modified in any reconsideration of that Order, or as a result of the Bureau's review of the AT&T plans implementing those safeguards, such modifications shall be applied to the Waived Services as well.

achieving this goal. We expressly stated that the CEI concept, based on permitting non-carrier enhanced service providers to make efficient use of basic network facilities, is not a suggestion that carriers should raise the costs of their own offerings artificially.[221] We further noted that some measure of pricing and functional comparability could be a possible way to implement a "rough comparability" standard. In considering the pricing of tariffed CEI offerings, we are well aware of the impact that appropriately priced CEI will have on the availability to the public of low-cost enhanced services, the continued health of the existing competitive markets for those services, and the motivation of carriers to provide effective CEI opportunities to their competitors. However, even under the "equal access" standard that we have adopted for CEI's functional characteristics, the proper pricing of CEI offerings is not self-evident. To some extent, this is a result of the variety of transmission and interconnection facilities that a carrier may employ in providing CEI to itself and other enhanced service providers. CEI pricing is also complicated by fundamental policy concerns about permitting carriers to realize the economic efficiencies that result from integration of basic and enhanced services, while at the same time providing them with incentives to make their bottleneck basic facilities available to others in ways that promote full and fair competition in enhanced services markets. We address these issues below.

(1) Positions of the Parties.

168. Carriers, such as the BOCs, AT&T, Centel, and USTA, argue strongly that pricing for CEI must be based strictly on the costs of facilities that an enhanced services provider uses for interconnection. BellSouth's suggested "pricing principle" for CEI is an example of such a cost-based methodology:

> *Pricing Principle*: When the dominant carrier and its competitors use underlying communications services in precisely the same manner and quantities, the prices the competitor pays for the service and the costs that the dominant carrier imputes to itself for the use of those communications services should be identical. If there are efficiencies inherent in integration which permit the use of comparable facilities with resulting cost savings, the carrier should be able to utilize these savings. Any

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[221] *Notice* at para. 118. As the *Notice* points out, in the *Asynchronous/X.25 Waiver Order*, we "explicitly declined to destroy . . . true efficiency by averaging techniques that might artificially raise the costs of the intraoffice wiring to levels comparable to those sustained by others that must currently utilize loops for comparable purposes." *Notice* at para. 117.

> differences between the charges paid by competitors and the costs imputed by carriers for rate development must be cost justified in a demonstration filed with the Commission.[222]

Other commenters supporting this approach contend that the carrier's cost savings from integration represent a true economy that should be available to carriers to pass on to their customers. For example, NYNEX points out that any pricing mechanism based on cost averaging forces low-cost enhanced service providers to subsidize the high-cost providers. Illinois also appears to support this general approach in contending that the appropriate unbundled CEI prices should reflect long-run marginal costs in order to cover the costs of new CEI facilities.[223] Cincinnati Bell calls for a slightly different regime, in which CEI would be priced on a "fully distributed cost basis plus contributions,"[224] which includes compensation for proportionate construction and maintenance costs, plus a reasonable return on investment. Cincinnati Bell argues that if any otherpricing methodology is used, its enhanced service customers would subsidize the rates of competitors' customers.

169. In contrast, price averaging schemes for CEI are supported by several enhanced service providers and groups, such as CompuServe, IIA, and ADTC, as well as manufacturers and trade associations such as IBM, DEC, CBEMA, and Amtel. In particular, IBM supports a CEI costing scheme patterned after the *MFJ*'s requirements for equal access to BOC local exchanges for interexchange carriers.[225] IBM points out that CEI may require carriers to make capital expenditures to extend interconnection to competing enhanced services providers. IBM proposes that, as under the *MFJ*'s equal access requirements, amortization of those expenditures should be averaged among all enhanced service providers that use the carrier's transmission and switching facilities, including the carrier's own enhanced services venture. The parties supporting such approaches argue strenuously that averaging is essential to preserving competitive enhanced service markets after the removal of structural separation. They argue that averaging directly places the carrier and its competitors on an equal underlying cost basis. Moreover, parties claim that

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[222] BellSouth Reply Comments at 22.

[223] Illinois Comments at 5-6.

[224] Cincinnati Bell Comments at 22.

[225] Under the terms of the *MFJ*, each BOC must make available to all interexchange carriers, including AT&T and the other common carriers, local exchange access of equal type and quality and must charge equal rates to all such carriers for such access. *MFJ*, 552 F. Supp. at 227-32.

averaging may motivate the carrier to provide efficient, low-cost forms of CEI by forcing the carrier's enhanced services operations to pay a portion of CEI costs.

170. Other parties support price parity schemes that are variations of price averaging. For example, TRINTEX, an enhanced services provider, would price the interconnection of facilities that are not collocated with the carrier's basic facilities as if such facilities were collocated. As an interim measure, GTE would require a carrier to charge its collocated enhanced services the same rates for CEI as it charges outside competitors. GTE states that the major reason for the disparity between the carrier's own internal costs of interconnection and the rates for interconnection now charged to enhanced service providers, such as the VANs, is that the rates charged to VANs are the result of broad averaging of the costs of all local services. GTE contends that a CEI price parity arrangement is necessary until carriers generally are allowed to implement nondiscriminatory, deaveraged rate structures for all services. As a final example, RCA generally supports averaging, but argues that in addition a competitor's price for CEI should be discounted if its connections to basic facilities are inferior to those of the carrier's enhanced services. RCA contends that such a scheme would motivate carriers to upgrade competitors' interconnections as much as possible.

(2) Discussion.

171. In designing a new regulatory framework for the offering of enhanced services by carriers, we seek to realize as fully as possible the dual goals of advancing the availability of efficient enhanced services while not unduly perturbing competition. Our decision in this *Order* to require the BOCs and AT&T to implement CEI in ways that permit all enhanced services carriers to interconnect to the basic network in a functionally equal manner represents one important step toward those goals. We also desire that CEI be implemented at the lowest cost necessary to satisfy our equal access requirements, both to encourage competitors to introduce innovative services using CEI to access the network and to ensure that carriers do not incur unnecessary costs in designing and implementing CEI. Ultimately, the costs of implementing CEI will be borne by the public, and if those costs are unnecessarily high, the public will suffer through inflated prices and reduced service.

172. A CEI pricing scheme that addresses these goals will promote competition and, consequently, efficiency and innovation. The two pricing schemes discussed in the record could be broadly categorized as "cost-based" pricing and "price averaging", with carriers generally supporting the former and competitors the latter. As an initial matter in analyzing these two pricing approaches, we recognize that in a CEI regime an enhanced service provider will typically use both common interconnection facilities where CEI is offered, which may serve numerous enhanced service providers, and dedicated transmission facilities that connect the provider with those shared interconnection facilities. Given that different pricing approaches can be applied to costs associated with transmission and interconnection facilities, we reiterate our general position stated in the *Notice* that CEI should not destroy true efficiencies that may be available because of collocation or integration. The purpose of CEI is to increase the interconnection efficiencies available to the carriers' enhanced service competitors, not to decrease the efficiencies available to those carriers. Accordingly, we decline to adopt a broad-brush, general averaging approach for all CEI costs incurred by the carrier and its competitors, since such averaging could deprive consumers of the opportunity to use highly efficient services at prices that reflect such efficiencies. As further developed below, we conclude that a price averaging requirement would be inappropriate for the distance-sensitive costs of the dedicated transmission facilities that connect an enhanced service provider to a carrier's common interconnection facilities because such costs are so specific to the particular competitive provider that averaging them could cause substantial economic distortions. However, we also find that all enhanced service providers, including the carrier, should pay an equal charge covering the costs of operating the interconnection facilities and providing the unbundled basic services utilized by all enhanced service providers. Depending on the exact implementation of the interconnection facilities, this equal charge may represent an averaged payment for interconnection. Finally, we also provide that an "averaging" approach should apply to the costs of traffic concentration equipment located at the carrier's facilities, but a "cost-based" approach should apply to the costs of such equipment located on the enhanced service provider's premises. Finally, we provide that standard tariffed rates should apply to certain preexisting, conventional network services that enhanced service providers may use in conjunction with certain offerings.

(a) Distance-Sensitive Transmission Costs.

173. All enhanced services providers use some transmission facilities whose costs are distance-sensitive to link their enhanced service facilities with carriers' basic service networks. A carrier's enhanced services, if collocated with or built into its basic facilities, may utilize transmission facilities consisting of intra-office wiring or even shared circuitry within a switch's electronics, the costs of which may be relatively small. In contrast, a competing enhanced service provider that is not so collocated may require loops, trunks, or similar transmission facilities from its premises to the nearest carrier central office or other point-of-presence. We now consider appropriate charges for these "distance-sensitive" transmission facilities.[226]

174. We conclude that the carrier's basic operations should be permitted to charge each enhanced services provider, including the carrier's own enhanced service operations, rates for "distance-sensitive" transmission facilities that are based on the actual costs of installing and operating such facilities for that provider. Such rates should appear as an unbundled rate element in the carrier's CEI tariff. Although we recognize that such rates for collocated enhanced services operations may be much smaller than for similar operations housed at a location several miles from the nearest central office, differences in the tariffed rates should be based on differences in the costs of providing the transmission facilities.

175. Cost-based rates for "distance-sensitive" transmission facilities are desirable in order to promote the availability to the public of low-cost, efficient enhanced services. The savings resulting from shorter local loops or trunks represent true economic cost savings. Averaging of these costs among all competitors would dispel the availability of these real transmission efficiencies to the public. Although some commenters argue that the carriers' enhanced services operations will have an overwhelming competitive advantage because of such rate differences, we find such an argument conclusory and unproven. Furthermore, there are a number of factors that point the other way. First, the costs of these transmission facilities are but one of many types of costs that an enhanced services provider must incur in developing, marketing, and operating an enhanced service. Non-carrier provid-

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[226] Such transmission facilities do not include any multiplexers, concentrators, or similar devices installed on the premises of the carrier or the enhanced service provider, in order to minimize the provider's transmission costs. We discuss the costs of such devices *infra* at paras. 180–82.

ers might well enjoy substantial efficiencies in these other areas. Second, we have required the carrier's basic operations to offer the most efficient possible distance-sensitive transmission facilities to others, and we believe that this requirement should mitigate the alleged competitive differences.

176. We also note that the location of a provider's enhanced service facilities outside a carrier's network is a factor over which the carrier itself has no control, and thus there appears to be little potential for anticompetitive activity by the carrier by way of manipulating the costs its competitors must bear. A provider with offices in the same city block as a carrier central office may pay lower distance-sensitive transmission rates than a competitor several miles away, but such differences are not in an appropriate basis for a subsidy by the lower-cost competitor. Furthermore, there may be sound business reasons, such as lower commercial real estate prices or local tax rates, why a competitor would locate its enhanced services operations at some distance from a carrier's facilities, which would not justify averaging of these rates among providers. Indeed, if distance-sensitive transmission costs were simply averaged, there would be perverse incentives for enhanced service providers to locate their operations in areas that minimized these other costs, but possibly increased the costs of serving them with transmission facilities. These increased distance-sensitive transmission costs would be borne by all other enhanced service providers operating in that general area and eventually by the public.

(b) Interconnection Costs.

177. To implement CEI for competitors according to the standards we have established, the carrier's basic operations will have to modify existing basic facilities or add new ones to allow competitors to interconnect with those facilities on an "equal access" basis. These interconnection facilities include the hardware and software required to provide the carrier and others with the underlying basic services, such as routing and signaling necessary for their enhanced services operation.

178. We require all enhanced service providers, including the carrier's enhanced services operation, to pay Basic Interconnection Charges at identical rates to the carrier's basic service operations to recover the costs of the interconnection facilities and the unbundled basic services used by each enhanced service provided by the carrier and others. We require the Basic

Interconnection Charge to be an unbundled rate element of the carrier's CEI tariffs.

179. Based on the record in this proceeding, it appears that some carriers are preparing to provide CEI through identical interfaces for themselves and others.[227] In these cases, there is no real issue of "averaging" vs. "cost-based" prices. Equal interconnection charges are appropriate under either standard. However, in other cases, the interconnection facilities that a carrier's collocated enhanced service requires may be different from those required for the same service provided by a noncollocated provider.[228] In these circumstances, the Basic Interconnection Charge represents an averaged payment for the installation and operation of the interconnection facilities and the associated unbundled basic services used by both the carrier and competitors in providing the particular enhanced service. We find this approach to be appropriate for several reasons. Unlike the situation with transmission facilities from the carrier's end office to the enhanced service provider's location, the carrier has substantial control over the costs of the interface facilities that other providers will use. By mandating averaged pricing, through which carriers will share in the costs of others' interconnection facilities, carriers will have incentives to design and install the most economical forms of interface facilities for others. Conversely, unlike the case with transmission facilities, averaging the costs of these interface facilities creates no incentives for enhanced service providers to locate or otherwise configure their facilities in an uneconomic fashion. Although we recognize that there may be cases in which this approach may preclude some customers from realizing benefits from services provided at the lowest possible cost, we find that this limited form of averaging will have the pro-competitive effects of providing incentives to carriers to lower overall costs of CEI and making economical services available from a wide variety of providers. On balance, we conclude that, for these interface costs, a rate averaging approach best serves the public interest.

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[227] For example, Ameritech's FN/SI network architecture proposes interconnection facilities configured to serve the enhanced services of the carrier and competitors in the same manner. *See infra*, paras. 204-205.

[228] If the carrier's proposed interconnection arrangements for other enhanced services providers satisfy the requirements of the functional CEI parameters that we adopt today, it is not required to utilize such interface facilities for its own enhanced services.

(c) Traffic Concentration Costs.

180. To satisfy our requirement that it offer efficient distance-sensitive transmission facilities to enhanced service competitors, a carrier may employ multiplexing or other types of traffic concentration techniques for some or all of those competitors. These traffic concentration functions typically require two pieces of equipment — one located at the carrier's central office and one located on the customer's premises. Such concentration equipment has similarities to both transmission and interface facilities. On the one hand, concentration equipment collocated with the carrier's basic facilities can serve multiple competitors, and in that respect is similar to interface facilities. Furthermore, the costs of the concentration equipment do not vary with the distance between the central office and the provider's premises. On the other hand, whether such concentration is economical or desirable for a given enhanced services provider is "distance-sensitive" because the costs of providing multiple loops or trunks compared to the costs of providing multiplexed data over fewer loops or trunks depend on distance. In addition, we note that the enhanced service provider can presently obtain on-premises multiplexing or concentration equipment in the unregulated CPE marketplace or by ordering multiple channels from the carrier itself on a tariffed basis.[229]

181. Based on these considerations, we conclude that a "price averaging" approach should apply to traffic concentration equipment located at carrier facilities, while a "cost-based" approach should apply to such equipment located on the premises of the enhanced service provider. Thus, a carrier's enhanced service operations and all other enhanced service providers must pay Basic Concentration Charges at identical rates to the carrier's basic services operations to recover the costs of the concentration facilities collocated with the carrier's basic facilities. Because of the similarities between such concentration facilities and other interface facilities, we find that our reasoning for adopting the equal Basic Interconnection Charge applies in this instance as well. We require the Basic Concentration Charge to be an unbundled rate element of the carrier's CEI tariffs.

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[229] Under our "multiplexer exception," carriers are permitted to provide multiplexers on customer premises under tariff to deliver separately-ordered transmission channels to the customer. *See infra* paras. 333–36.

182. With respect to concentration equipment located at an enhanced service provider's premises, the provider shall be free to obtain such equipment in the CPE marketplace at a competitive price or from the carrier, either as CPE or under tariff pursuant to our multiplexer exception.[230] In this manner, the provider will have the choice provided by the competitive marketplace in purchasing such concentration equipment.

(d) Network Usage Costs.

183. A particular enhanced service may utilize the carrier's preexisting basic network for such purposes as conventional data or voice communication,[231] or for the transmission signals with specialized uses in such enhanced applications as alarm or monitoring services.[232] Depending on the particular service, both the carrier and other enhanced service providers may utilize such facilities.[233] We note that in most areas, those costs will be determined by standard tariffed rates for voice or data communications.

184. We require both the carrier's enhanced service operations and those of competitors to be charged standard tariffed rates for such communications and signaling services. Such rates may be based on usage, such as local measured service, or on a flat rate within an exchange. Because of the variety of enhanced services and the possible uses that they may make of the network's communications signaling capabilities, we choose not to specify a pricing requirement for these basic service components of enhanced service offerings.

185. We recognize that a carrier conceivably could locate its enhanced services facilities to minimize its use of the network. We also note, however, that a competing enhanced service provider might be able to strategically locate its facilities in a similar manner. The record does not identify such a possibility as

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[230] The carrier may not restrict the enhanced service provider's freedom to obtain such CPE by only providing CEI when the traffic concentration equipment on the provider's premises is obtained from the carrier as a bundled portion of the CEI tariffed offering. Such bundling would have unacceptable anticompetitive effects on the CPE markets.

[231] To access interface facilities offered as part of CEI, an enhanced service provider does not necessarily require a loop or trunk directly from its premises to those facilities. Instead, such a loop or trunk could connect to the nearest central office or point-of-presence and could ultimately connect to the interface facilities through the basic network.

[232] *See, e.g., Spread Spectrum Waiver Order, supra* note 155.

[233] For example, if a carrier and its competitors provide a voice-store-and-forward service through the network, each provider would utilize the voice network to forward messages.

substantial competitive concerns. Therefore, given our equal access standard and our other pricing policies for CEI, we find that the anticompetitive dangers or losses in efficiency that may occur because of such activities are too speculative to require further consideration in this *Order*.

186. We recognize that as the enhanced services industry and carriers gain experience with CEI, changes may be required in the CEI pricing mechanisms described above, particularly with respect to our treatment of traffic concentration charges, which may be affected by, among other things, our treatment of the multiplexer exception.[234] Accordingly, we will continue to monitor this aspect of CEI and stand ready to modify it, if by doing so, we would better serve the overall public interest goals of the CEI requirements.

(d) CEI Plans and Nondiscrimination Reporting.

(1) Positions of the Parties.

(a) CEI Plans.

187. BellSouth and others propose that, for the near future, carriers should be required to demonstrate to us how they satisfy any CEI principles that we establish. Numerous other parties contend that in general, AT&T and the BOCs should be required to file detailed plans with us outlining the manner in which they intend to comply with the nonstructural safeguards we establish in place of structural separation, which would include CEI.[235] Such parties also strenuously argue that we subject such plans to public comment prior to taking major actions such as providing AT&T or the BOCs with structural relief. Those commenters claim that public debate should be completed before we permit actions that affect the entire telecommunications industry; otherwise, they contend, we will have to result to *post hoc* proceedings that could require piecemeal regulatory remedies. Other commenters claim that such review is particularly important for new concepts such as CEI to minimize the danger of potential anticompetitive effects of a carrier's CEI arrangements.

(b) Nondiscrimination Reporting.

188. A number of parties argue that key aspects of CEI are the

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[234] *See infra, paras.* 333–36.

[235] *See, e.g.*, ICA Comments at 21–22, ADAPSO Reply Comments at 64; NATA Comments at 59–60.

efficient processing of installation and maintenance requests and the provision of equal quality basic services to competitive enhanced service providers. They argue that carriers could provide their own enhanced service organizations with quicker installation and maintenance, and higher quality service, than they provide to their competitors. They argue that, at a minimum, AT&T and the BOCs should be required to file reports that will permit us to determine whether requests for installation and maintenance of basic services are processed in as timely a fashion for competitive providers of enhanced services and their customers as they are for carriers' enhanced service operations and their customers. They also argue that, because of the importance of the quality of the basic service components of many enhanced service offerings, carriers should be required to file similar comparative reports concerning the quality of the basic services they provide to their own and competing enhanced service operations.

189. Several parties express concern that reporting requirements will not be sufficient to alleviate all potential discrimination concerns raised by carrier control over bottleneck facilities. They propose that we should impose further requirements, such as the centralized operations groups (COGs) currently in effect for the BOCs, on other carriers.[236] They contend that, at least for the BOCs, COGs have worked well and would not impose substantial new costs. They further argue that COGs or similar requirements would aid the goals of CEI by requiring all providers of enhanced services (including carrier affiliates) to obtain installation and maintenance of basic services from the same provisioning personnel in carriers' basic services organizations.

(2) *Discussion.*

(a) *CEI Plans.*

190. Until implementation of Open Network Architecture as described below,[237] if AT&T or a BOC desires to offer an enhanced service without being subject to the structural separation requirements, it must file a CEI Plan for that service demonstrating compliance with the CEI technical and pricing standards that we have established in this *Order.*[238] The CEI Plan must contain a short general description of the enhanced service

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[236] ADAPSO Reply Comments at 56; ADTC Comments at 29; DEC Comments at 18.

[237] *See infra*, paras. 210–22.

[238] As we have discussed, in the rare circumstances where a carrier seeks to be permitted to offer an unseparated enhanced service without total compliance

offered to notify us of the utility and purposes of the CEI arrangements described in the Plan. It must also specify in detail whether the carrier's offering of an enhanced service utilizes the same interconnections to the underlying basic services as those offered to other providers through CEI. If the interconnections are not identical, the carrier must explain how it satisfies the equal access criterion mandated in this *Order*. We will closely scrutinize the carrier's Plan to ensure that it minimizes any differences in transmission costs between it and its competitors. The CEI Plan must also include sample state and federal tariffs for the Basic Interconnection Charge and the distance-sensitive transmission charges that satisfy our CEI pricing requirements.

191. We recognize that there is potential for delay in this review process, and we seek to minimize the possibility of such delay. Accordingly, if a carrier files a CEI Plan that proposes CEI arrangements that are substantially the same as those we already have approved for a functionally equivalent service offered by it or another carrier, we will make every effort to expedite the review process by adjusting the pleading cycles or otherwise.[239] However, we will approve or deny all CEI Plans only after first soliciting public comment on them. After approval of the CEI Plan, and carrier conformance with the other nonstructural safeguards established in this *Order*, the carrier may offer the enhanced service on an unseparated basis. CEI tariffs for the service at issue must take effect before the carrier may offer the service.

(b) Nondiscrimination Reporting.

192. We believe that an important purpose of CEI is to ensure that all providers of enhanced services, whether affiliated with a carrier or not, are able to obtain basic services of equal quality and in a timely fashion. Because of the absolute dependency that enhanced service providers have on the underlying basic services provided by carriers, we seek to ensure that the BOCs or AT&T do not discriminate in favor of their own operations or their own customers in providing underlying basic services. Therefore, we require AT&T and the BOCs to file with us quarterly reports comparing the level of service they provide to their enhanced

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with our CEI requirements, its Plan must fully describe the reasons for such noncompliance.

[239] We require the filing carrier to demonstrate with particularity in its CEI Plan that the conditions for expedited treatment that we specify in this paragraph are satisfied.

service affiliates with that they provide to their enhanced services competitors. These reports should include the timing of installation and maintenance of basic services and should address the quality and reliability parameters that we have described.[240] The reports should be provided on each type of basic service employed as part of any CEI tariff. Since we are concerned with potential discrimination against the customers of competing enhanced service providers, as well as against the providers themselves, AT&T and the BOCs should also provide reports on the timing and quality of their basic services associated with enhanced services provided to end-users that access the offerings of competing enhanced service providers through dedicated facilities — cross-indexed to indicate whether or not the enhanced service provider is an AT&T or BOC affiliate. We also require such reports to describe in detail any complaints received by the carriers from CEI users that are testing new CEI offerings prior to or after tariffing pursuant to Paragraph 163 above.

193. In the *AT&T Structural Relief Order*, we concluded that a COG requirement was not necessary for AT&T and that result-oriented reporting requirements were sufficient to ensure that all AT&T customers obtained the same ordering and provisioning support for network services regardless of whose CPE they selected.[241] We find no information in the comments that would cause us to reassess this conclusion for AT&T's unseparated provision of enhanced services and conclude that the costs of imposing such a requirement on AT&T are not offset by sufficient countervailing benefits. However, in the *BOC Structural Relief Notice*, we noted that the BOCs already had COGs in place and retaining them would not entail substantial additional costs.[242] We further tentatively concluded that the BOCs, because they are subject to relatively less competition in their offerings of basic services than is AT&T, might present a somewhat greater potential for discrimination, and thus additional nondiscrimination safeguards might be appropriate. Because we have not yet reached any final conclusions as to whether the BOCs should be required to retain their COGs for their unseparated provision of CPE if we provide them with structural relief, we will defer to the *Supplemental Notice* a final determination on whether COGs should be required for the unseparated provision of enhanced services by the BOCs. Pending the final resolution of the issues

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[240] *See supra* paras. 154-66.

[241] *AT&T Structural Relief Order*, 102 FCC 2d at 690, para. 58.

[242] *BOC Structural Relief Notice* at para. 52.

raised in the *Supplemental Notice*, we will require the BOCs to retain their COG mechanisms and to order all basic services for their enhanced services operations, including basic services for those enhanced services not subject to structural separation, through their existing COGs.

(e) ISDN.

194. In the *Notice*, we specifically asked for comment regarding the impact of our CEI proposals on the integrated services digital network (ISDN) design now under development in international standards organizations. We observed that the BOCs have sought waivers of the structural separation requirements in order to provide an interface between asynchronous terminals and the packet switched local area data transport (LADT) networks they wish to offer. Data transmission over these networks would be offered as basic service and would provide a transport medium for enhanced services offered by both the BOCs and other providers.

195. We further noted that, ultimately, these LADT networks would probably conform to the standards for ISDN or to similar ones developed by the T1 Committee. One of the standard ISDN interfaces is the so-called 2B + D package (two 64 Kb/s "B" information channels and a 16 Kb/s "D" signaling channel). We observed that the D channel not only controls the utilization of the B channels, but can also be used directly to access the carrier's packet network. Given that in the future this interface could be an enhanced service provider's principal efficient form of access to local exchange facilities, we noted that the ISDN system architecture, as currently proposed, might have "bottleneck" characteristics. The *Notice* observed that with the likely advent of an ISDN, it may be necessary to develop a CEI policy in order to sustain effective competition. We accordingly solicited comments on ISDN developments and on appropriate definitional and structural approaches that can best serve our dual goals of promoting communications efficiency and the benefits of competition."[243]

(1) Positions of the Parties.

196. Some parties do not believe that CEI will be a significant problem in the ISDN environment. Bell Atlantic and BellSouth claim that access to the 2B + D in itself will be an effective method of offering CEI. NYNEX advocates a plan for providing

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[243] *Notice* at para. 133.

CEI through trunkside D channel interconnections, but states that it is premature to specify the exact nature of the CEI interconnection.

197. IBM suggests that "[a]n appropriate CEI implementation would permit competing enhanced service providers to gain access to the signaling channel packet switching service, instead of the current arrangement where only the carrier has access to such a service."[244] IBM then proposes an arrangement that, it asserts, could effectively provide unbundled D channel access by subscribers to the packet switching facilities of non-carrier enhanced services providers. Such an arrangement would entail a so-called "D-Channel Handler", to be installed in an LEC end office, which would separate the signaling packets from the information packets and then route the information packets to a customer-selected enhanced service vendor.[245] ADAPSO supports this general approach, and Tymnet endorses the IBM proposal in its reply comments. Xerox, while not specifically endorsing the IBM proposal, also proposes that CEI be implemented by offering the equivalent of access via an unbundled D channel.

(2) Discussion.

198. The record indicates that any CEI problems associated with an ISDN architecture would be manageable under our requirements. Some parties contend that the ubiquitous availability of a 2B+D subscriber loop would in itself offer an effective form of CEI for enhanced service providers. We recognize the plausibility of such arguments for many types of enhanced services. It appears that a line-side 2B+D loop that is available to subscribers and enhanced service providers alike could provide a feasible form of CEI for services, such as proprietary information retrieval services, that require subscriber interaction with a host computer. Currently, an enhanced service provider using the circuit switched telephone network as a transport medium would ordinarily implement a multi-subscriber capability by procuring a number of local loops. A single 2B+D interconnection of a host computer to a packet network should be a highly cost efficient alternative to the options that are presently available.

199. IBM and NYNEX both propose solutions, based upon the use of the D channel, that apparently would provide an interconnection capability to a communications channel that otherwise

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[244] IBM Comments at 29.
[245] *See id.* at n. 40.

would be "closed" to all enhanced service providers other than the carrier. Such solutions, if technically feasible, could well provide an important interconnection option for some enhanced service providers. While such approaches are consistent with the general goals of CEI, we shall not mandate in this proceeding a specific technical solution regarding access to the D channel. We note that the final specifications for ISDN, including those for the local loops, have not yet been completely codified. Nor have the domestic carriers yet set forth the specifics of their commitment to a large-scale ISDN with respect to technical parameters, geographical coverage, or timing. Given these considerations, we find that it would be premature at this time to take any action that could tend to lock in the ISDN design or, conversely, that could be outmoded by changes in that design.

200. We stress, however, that carriers utilizing ISDN implementations must conform to our CEI principles. If a carrier offers enhanced services utilizing the packet switching capabilities of the D channel, it must offer CEI for such capabilities to other enhanced service providers. Because of the ongoing intensive efforts in domestic forums, such as the T1 Committee, to design ISDN architectures, we consider such forums to be logical centers of such efforts.

2. *Open Network Architecture.*

201. The CEI requirements that we define in this *Order* establish conditions under which AT&T and the BOCs may offer a specific enhanced service free of the structural separation regulations. These CEI requirements contemplate the filing of CEI Plans, which must be reviewed and approved by the Commission prior to carrier offering of the particular enhanced service. We now build on those requirements to define an Open Network Architecture standard that, by extending to enhanced services generally the CEI goals of preventing discrimination and promoting efficiency, would permit AT&T and the BOCs to offer such services on an unseparated basis without the need for the filing and approval of service-specific CEI Plans.

a. *Positions of the Parties.*

202. We did not specifically request comment on the Open Network Architecture concept in the *Notice*. However, several parties devote substantial portions of their comments to exploring the close relationship between our CEI proposals and a more expansive approach that "opens" the basic network to efficient

access by enhanced services providers. These Open Network Architecture proposals receive significant attention in the reply comments as well.

203. DOJ describes "Open Architecture" as a regulatory regime that encourages dominant carriers to implement technological changes that, by decreasing competitive risks, will reduce the need for regulation. DOJ describes such an architecture as being: (a) transparent for the transmission of information; (b) open to all vendors and end-users in a manner that makes discrimination by the carrier difficult or impossible; and (c) designed for easy detection of cross-subsidization efforts by the carrier. According to DOJ, the goal of such an Open Architecture is to allow "all would-be providers of a competitive service, including the firm that presently holds the bottleneck monopoly, to provide service on the basis of relatively equal costs of interconnection to the bottleneck."[246] DOJ notes that BOC implementation of such architectures may be the type of technological change that could warrant reconsideration of the *MFJ*'s prohibition on the BOCs' provision of information services. DOJ cites collocation and CEI as two possible ways of at least partially ensuring the equal interconnection that is crucial to implementation of its Open Architecture.

204. Ameritech describes its FN/SI architecture in detail, and proposes it as an interconnection arrangement that, it claims, will provide new functionality and efficiencies that are comparable for all enhanced service providers, including the carrier's own enhanced operations. In the FN/SI architecture, a carrier would offer elemental basic service capabilities, which Ameritech refers to as "primitives,"[247] to enhanced service providers in an efficient manner. Using these primitives, providers would be able to design and implement a wide variety of enhanced services. The carrier would control the deployment of such primitives either through its switch software or remotely from a new centralized network hub Ameritech calls the "Routing Control Point." The Routing Control Point would contain a database that would associate enhanced service providers with the end-users that utilize their services. The providers' hardware and software for implementing their offerings would be located in a so-called Feature Node owned

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[246] DOJ Comments at 27.

[247] According to Ameritech, primitives includes such functions as "hold call", "transfer on busy or on no-answer", "collect digits", "pass control of a call", "make a billing record", and "transfer of information on line number or line status". Ameritech Comments at App. B-8.

by the provider and located outside the network. Ameritech proposes that an industry standard "Service Interface" would connect the Feature Node to the basic network.

205. Ameritech expects that the carrier itself would utilize the centralized Routing Control Point for controlling network primitives from which it would create enhanced services. DOJ, in commenting on Ameritech's proposal, notes that if the primitives and control functions of the Routing Control Point are located separately from the basic network switches, FN/SI would not provide an optimally efficient form of interconnection for those services that could most economically be provided if they are collocated at a network switch. However, if the carrier's enhanced services utilize the Routing Control Point, like those of any other enhanced service provider, there could be equal interconnection. Ameritech claims that "an architecture such as FN/SI, designed to encourage multiple vendor use of the network while encouraging essential efficiencies, provides an optimal balance between efficiency and the competitive benefits of comparable interconnection."[248] Ameritech cautions that at present FN/SI is merely a proposal. It predicts that implementation of an initial version could begin in early 1988. Ameritech notes that protocol conversion is not a function that can be efficiently offered through FN/SI. More generally, Ameritech notes that the evolution of the basic network to an ISDN environment could raise new interconnection issues.

206. Echoing the concept of network "primitives," commenters such as PacTel and NTIA support requirements that carriers create unbundled "building blocks" of elemental basic services and offer them under tariff to enhanced service providers. According to NTIA, such "building blocks" would include basic service functions such as off-hook status, answer supervision, and general signaling functions. PacTel contends that such unbundling will preclude carrier discrimination against interconnecting competitors and will make available the efficiencies of the network to customers and competitors. DOJ supports such an unbundling requirement as a crucial aspect of a procompetitive, open network market structure. However, Southwestern Bell opposes the adoption of specific rules for the unbundling of basic services, claiming that function-specific unbundling requirements could "promote artificial rate structures, distort market incentives, and misallocate resources."[249] Instead, Southwestern Bell would attempt to

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[248] *Id.* at 46.

[249] Southwestern Bell Comments at 37.

provide unbundled rate elements whenever significant cost variations can be identified. AT&T, which also opposes specific unbundling rules, proposes that questions concerning which elements of a tariff offering should be unbundled can be best addressed in the tariff process.

207. US West strongly advocates that the Commission adopt an Open Network Architecture requirement as a replacement for the regulations that the Commission, the *MFJ* court, and state regulators now impose on both basic and enhanced services. According to US West, the growth of competition in all telecommunications markets requires the free participation of local exchange carriers in such markets to maximize the efficiency of the network. US West argues that if Open Network Architecture actually can be implemented, the provision of telecommunications largely can be governed by competitive market forces. US West also considers that a key element of such an Open Network Architecture is the unbundling of network services in accordance with market demand. US West states that it will unbundle existing network services on customer request if: (a) there is enough market demand for the unbundled offering to make it profitable; (b) the requested unbundling is technologically reasonable; and (c) regulations do not preclude the offering of the unbundled service at a price that is market based.[250] In addition, US West argues that flexible, demand-based access arrangements are essential to developing services governed by market forces. Such "access" encompasses installation, maintenance, and serving arrangements.

208. Other commenters, such as Northern Telecom and Siecor, propose still other versions of Open Network Architecture that emphasize high efficiency, standard access, and internetworking arrangements. They stress that such architectures are necessary to realize fully the public benefits of enhanced services competition and to preserve the viability of the basic network by making it more competitive with bypass alternatives.

209. While many parties react favorably to the general concepts and proposals for Open Network Architecture implementation, a substantial number of commenters caution that FN/SI and similar proposals are so novel and untested that, for the present, the Commission should not rely on them as adequate safeguards. For example, CompTel, while supporting a strong unbundling requirement to promote the efficient and economical design of enhanced

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[250] US West Comments at 73.

services, criticizes numerous particulars of both the Open Architecture concept and the FN/SI proposal. CSEPA, Gannett, and others claim that FN/SI and ISDN are years away from realization. However, Gannett emphasizes that an equal access form of CEI is an essential nonstructural safeguard. IBM, Xerox, IDCMA, ADCU, and others support further examination of Open Network Architecture and CEI issues, either through further Commission proceedings or through industry forums, such as the T1 Committee sponsored by the ECSA.

b. Discussion.

210. In this *Order*, we establish a set of nonstructural safeguards designed to promote the efficiency of the telecommunications network, in part by permitting the technical integration of basic and enhanced services and in part by preserving competition through the control of potential anticompetitive behavior by carriers. We have discussed our conclusion that CEI requirements, applied on a service-by-service basis, are necessary preconditions for AT&T and the BOCs to offer enhanced services without structural separation. We have found that it is necessary to examine and approve service-specific CEI Plans in part because the network as currently designed may require a number of quite different CEI implementations for different services and types of services. Such varied implementations require case-by-case scrutiny to ensure that the proposed interconnection arrangements satisfy our CEI requirements.

211. However, the record in this proceeding has convinced us that such detailed and time-consuming regulatory procedures may not be required if carriers design their basic networks to satisfy Open Network Architecture requirements that are self-enforcing in controlling discrimination. Essentially, we conclude that in a network design that uses properly defined Open Network Architecture principles, a technological implementation of our requirements can replace our service-by-service regulation of carrier participation in enhanced services markets.

212. This conclusion is based, in part, on the explanations offered by carriers of the features they would incorporate into Open Network Architecture. For example, Ameritech states that in its FN/SI approach it is designing interconnection arrangements that would be used both by the carrier's enhanced services operations and by its competitors. Because if is in the carrier's competitive self-interest to utilize efficient interconnections, we view Ameritech's proposal as an indication that an architecture

with highly efficient interconnections can be designed. In addition, such a design, by providing equal interconnection for the carrier and its competitors in all technical respects, would limit the carrier's ability to engage in other forms of discrimination (*e.g.*, in installation and maintenance) by making such activity easier to detect.

213. While we acknowledge the potential value of Open Network Architecture as a nonstructural safeguard to replace the burdensome structural separation requirements for enhanced services, we also recognize that the architectural implementations described in the comments are merely general proposals that do not fully address our regulatory concerns. Accordingly, we do not adopt or approve any of the commenters' network architecture proposals at this time. Rather, we specify certain standards that a carriers' Open Network Architecture Plans must meet. Upon our approval of such a Plan, a carrier will no longer be required to file a CEI Plan for each enhanced service that it offers. We have developed the Open Network Architecture requirements based on the extensive record before us. By adopting general requirements rather than mandating a particular architectural implementation, we wish to encourage development of the most efficient interconnection arrangements possible that will satisfy our regulatory goals.

(1) Unbundling and Resale Requirements.

214. As part of any Open Network Architecture, carriers must provide unbundled basic service "building blocks" (Basic Service Elements) to others on a tariffed basis. Such unbundling is essential to give competing enhanced services providers an opportunity to design offerings that utilize network services in a flexible and economical manner. In essence, competitors will pay only for those Basic Service Elements that they use in providing enhanced services.

215. To promote the development of economical Basic Service Elements and to deter possible discrimination, we require carrier-provided enhanced services to utilize Basic Service Elements under the applicable tariffed terms and conditions, including rates.[251] Conversely, each set of basic services that a carrier incorporates into an enhanced service offering must be available

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[251] Because the carrier's enhanced services operation will obtain Basic Service Elements under tariff, customers and competitors will have access to some basic cost information for monitoring the prices of the carrier's enhanced services.

to the public under tariff as a Basic Service Element or as a set of Basic Service Elements. Through these requirements, we hope to provide effective incentives for carriers, which presumably will seek to minimize their own costs for competitive offerings, to minimize basic service costs for all enhanced service providers.

216. The identification and availability of Basic Service Elements are key aspects of our unbundling requirement. The comments contain numerous examples and suggestions for basic service functions that theoretically could be offered as Basic Service Elements. While we require all basic services incorporated into a carrier's enhanced offering to be available to others as a Basic Service Element or Elements, we will not permit carriers to introduce Basic Service Elements *only* at the same time or after they introduce enhanced services that utilize those Elements. Instead, we require each carrier subject to the Open Network Architecture requirements to develop an initial set of key Basic Service Elements that can be used in a wide variety of enhanced services and that will be provided to the public upon request. We would expect such a set to contain unbundled basic service functions that could be commonly used in the provision of enhanced services to the extent technologically feasible.[252] This initial set must be available to the public within one year of approval of the carrier's Open Network Architecture Plan.[253]

217. We are well aware of the inefficiencies that may occur from unnecessarily unbundled or splintered services.[254] Accordingly, we require participating carriers to make available the initial set of Basic Service Elements based on the expected market demand for such elements, their utility as perceived by enhanced service competitors, and the technical and costing feasibility of such unbundling. We expect the carriers to make these decisions with participation from the rest of the enhanced service industry. Such participation will provide the carriers with valuable input from other enhanced service providers regarding their projected needs for basic services, which would be essential for network planning. It will also decrease the potential for possible discrimination by the carriers in designing Basic Service

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[252] For example, as ISDN architectures develop, we would expect that D channel access would be included as a Basic Service Element if such access is a useful component of future enhanced services offerings.

[253] We anticipate that carriers will augment this initial set of Basic Service Elements as new basic and enhanced services are created.

[254] *See, e.g.*, AT&T Communications Revisions to Tariff FCC Nos. 1, 9, and 10, Transmittal No. 231, *Memorandum Opinion and Order*, CC Docket 85-203, (released November 7, 1985).

Elements. Therefore, we urge representatives of the carriers' enhanced and basic operations to meet with enhanced services competitors prior to the filing of the Open Network Architecture Plans, in industry standards organizations or in other forums, and establish an appropriate initial set of Basic Service Elements. We believe that this process will prevent the imposition of arbitrary and uneconomical unbundling requirements on the carriers, by permitting the carriers and the rest of the enhanced services industry to develop in the first instance the appropriate components of an Open Network Architecture. We require each carrier to explain in its Open Network Architecture Plan the procedures and industry participation it utilized in developing its initial Basic Service Elements. We also require carriers to specify procedures in their Open Network Architecture Plans that permit other providers to request and receive new Basic Service Elements from the carrier's basic service operations in an expeditious manner.

(2) CEI Requirements.

218. In addition to the unbundling and resale requirements just described, an acceptable Open Network Architecture implementation must incorporate a technical design that satisfies the CEI parameters discussed in Section IV.B.1. We consider these parameters to be at the heart of the ability of an Open Network Architecture design to promote both efficiency and competition, and we will approve such a design only if we are satisfied that it adequately meets these requirements. We do not wish to restrict the possible technical implementations of Open Network Architecture. However, in reviewing such implementations, we will view more favorably those designs that utilize the same interconnection facilities for the carrier's enhanced service operations as for other enhanced service providers since the equal functionality and antidiscrimination aspects of such a configuration are more easily evaluated. An Open Network Architecture design that permits a carrier to integrate its enhanced services within basic service software or hardware, while other services interconnect in a different manner, will require the carrier to bear a somewhat heavier burden of demonstrating that, despite the difference in interconnection facilities, its design satisfies our CEI requirements. The quarterly nondiscrimination reports described in Section IV.B.1 will continue to be required under Open Network Architecture.

(3) Development of Open Network Architecture.

219. We decline to initiate a separate proceeding to develop specific network designs that satisfy our Open Network Architecture requirements. Given the general nature of these requirements, we find that this process most appropriately should occur in the private sector, where interested parties can participate in the development of Open Network Architectures that are suited to specific enhanced and basic service markets. Under the flexible approach to network specification that we are adopting, it is our view that private standards organizations, such as the T1 Committee, should play a major role in resolving relevant standards issues that may arise among carriers and enhanced service providers participating in enhanced service markets.[255] At this time, we believe that the activities of such forums can ensure that relatively minor variations among carriers' specifications for Basic Service Elements and CEI standards will not adversely impact efficiency or competition in such markets. If we perceive that such adverse impacts are occurring or that the standards process is not functioning in an open and equitable manner, we will take whatever action is necessary to remedy the situation.

(4) Open Network Architecture Plans.

220. On or before February 1, 1988, AT&T and the BOCs must file Open Network Architecture Plans with the Bureau that describe their compliance with the foregoing requirements and list their initial set of Basic Service Elements.[256] Our approval of each carrier's Plan is a precondition to the removal of structural separation for that carrier's enhanced service operations. Prior to such approval, we shall request and evaluate public comment on the Plans. After implementation of an approved Open Network Architecture Plan and the carrier's satisfaction of our cost allocation and other safeguards,[257] the structural separation requirements will no longer apply to the carrier's enhanced services operations, and it will not be required to file a service-

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[255] Other private forums also may be appropriate. The activities of the Task Force on CEI are a positive sign that such forms of private involvement in addressing these issues are feasible.

[256] If any of the BOCs or AT&T does not timely file its Open Network Architecture Plan, we will not consider any subsequent interim CEI Plan filed by that carrier.

[257] The carriers must satisfy these other nonstructural safeguards discussed *infra* in Section IV.B.3 before the removal of the structural separation requirements.

specific CEI plan prior to offering a new enhanced service.

221. If the carrier, after implementing an Open Network Architecture, wishes to offer an enhanced service that uses a new Basic Service Element or otherwise uses different arrangements for underlying basic services than those explained in its Open Network Architecture Plan, it must file an amendment to its Plan with the Bureau at least 90 days prior to offering that enhanced service. The Bureau will examine such amendments, and if it identifies any significant uncertainty as to whether they satisfy the Open Network Architecture requirements, it shall request public comments on the amendments. We hereby grant delegated authority to the Chief of the Bureau to grant or deny approval of such amendments. The carrier shall not be permitted to offer the enhanced service until the Bureau Chief approves the amendments.

222. We find this 90-day time period necessary in an Open Network Architecture environment to permit enhanced service competitors to develop new offerings on a competitive basis, because such competitors will not have the specific notice provided by a CEI Plan filed with us that a carrier will be offering a new enhanced service. Although the potential exists for some delay in permitting carriers to offer enhanced service that do not meet the specifications of their Open Network Architecture Plans, we find that to a large extent each carrier can eliminate this potential by developing a flexible and comprehensive Open Network Architecture Plan that addresses a wide variety of enhanced services. Our complaint process is available to carriers' enhanced services competitors and end users as a continuing check on potential anticompetitive activities.

3. *Nonstructural Safeguards for the Enhanced Services Operations of AT&T and the BOCs.*

223. In addition to the requirements we are establishing with respect to CEI and Open Network Architecture, we have decided to require AT&T and the BOCs to implement certain nonstructural safeguards to replace the structural restraints we are eliminating for their enhanced service activities.[258] These additional nonstructural safeguards are in three areas: (1) allocation of joint and common costs; (2) disclosure of network

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[258] As with CEI, we will not in this *Order* require the Independents to comply with these nonstructural safeguards for their provision of enhanced services, but will consider whether we should establish such requirements in the *Supplemental Notice. See supra* para. 132.

information; and (3) access to customer proprietary network information (CPNI). While in this *Order* we specify the majority of these safeguards, we defer a final resolution on certain others to further proceedings in this and other dockets.

224. First, with respect to cost allocation, we will defer to the recently initiated *Joint Cost* proceeding the development of appropriate procedures for allocating the joint and common costs incurred in the unseparated provision of basic and enhanced services by AT&T and the BOCs; however, as an interim measure pending adoption of a final order in the *Joint Cost* proceeding, AT&T and the BOCs will be permitted to file interim cost allocation plans for specific enhanced service offerings based on the proposals in the *Joint Cost Notice.* Second, with respect to network disclosure, we require AT&T and the BOCs to disclose information about changes in their networks or new network services that affect the ability of enhanced services providers to interconnect with those networks. Disclosure is required at the "make/buy" point — *i.e.* when AT&T or a BOC makes a decision to manufacture itself or relies on the network interface. As an interim measure, AT&T — but not the BOCs — may use nondisclosure agreements in effectuating disclosure. We defer to the *Supplemental Notice* in this proceeding in final determination on the use of such agreements by either AT&T or the BOCs. Third, with respect to CPNI, we require AT&T to make such information available to any enhanced services vendor at the customer's request and to provide confidential treatment for CPNI at the customers request. Pursuant to this latter requirement, AT&T will have to keep CPNI from its own enhanced services personnel if the customer so requests and will have to provide the customer with access to network services personnel that are not involved in the sale or provision of enhanced services. These CPNI requirements are applicable to the BOCs on an interim basis. We consider in the *Supplemental Notice* whether it is appropriate to impose additional restrictions on BOC use of CPNI in their enhanced services operations. We also inquire in that further proceeding whether AT&T and the BOCs should be required to provide information about their networks aggregated from CPNI.[259]

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[259] Our decision to defer a final decision on certain nonstructural safeguards to the *Supplemental Notice* is based in part on our desire to permit parties to comment on particular safeguards in light of their experience with the safeguards we established in the *AT&T Structural Relief Order* for AT&T's provision of CPE and our proposals for safeguards for BOC provision of CPE in the *BOC Structural Relief Notice.* In this regard, we note that our primary

225. As we indicated for AT&T's CPE operations in the *AT&T Structural Relief Order*, it is our view that safeguards are an essential part of the relief from structural separation, and we intend that they be implemented conscientiously. To that end, should we observe noncompliance with these safeguards, through the reporting procedures we establish in this *Order* or our complaint process, we are prepared to take the appropriate remedial steps, including, if necessary, the reimposition of structural safeguards. Furthermore, if we subsequently should conclude that these safeguards are either inadequate or overly burdensome, we believe there will be ample opportunity to modify them in the process of developing CEI and Open Network Architecture concepts and in further proceedings in this docket.

a. Cost Allocation Procedures

(1) Positions of the Parties.

226. All parties agree that in the absence of structural separation, AT&T and the BOCs should be required to file cost allocation plans that will properly allocate the joint and common costs created by their provision of enhanced services unseparated from their basic services.[260] Parties also generally agree that any cost allocation plans should directly assign costs wherever possible and employ some method of apportioning joint and common costs between regulated and unregulated services when direct assignment is impossible. However, parties are in substantial

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goal in developing nonstructural safeguards for the enhanced service offerings of AT&T and the BOCs is to prevent any improper cost-shifting and other anticompetitive activity on the part of these carriers, while not imposing undue burdens on their ability to compete actively in the enhanced services markets. In pursuing this goal, we recognize that different carriers participating in different markets potentially raise different competitive concerns. We also believe, however, that in developing these safeguards it is important to achieve some measure of consistency in the rules that will govern the participation of AT&T and the BOCs in all nonregulated communications activities. Different rules for each type of nonregulated activity and for each individual carrier would potentially impose the same sorts of inefficiencies and confusion that we are attempting to eliminate in this proceeding. Consequently, we are establishing, or proposing, safeguards for enhanced services that in many cases are similar to those we have previously imposed on, or proposed for, the CPE activities of AT&T and the BOCs -- consistent with the different competitive concerns raised by the provision of CPE and enhanced services and by the differences in markets served, and market power exercised, by AT&T and the BOCs.

[260] Even carriers such as MCI, which argue that cost allocation plans cannot adequately replace structural separation, agree that such plans will be required if structural relief is granted to AT&T and the BOCs for their enhanced services offerings. *See* MCI Reply Comments at 40-51.

disagreement over exactly what allocation method should be employed to deal with joint and common costs.

227. Several BOCs, Anchorage Telephone, and others argue that we should permit carriers to use incremental cost approaches in establishing principles for enhanced services cost allocation plans and should not require that carriers employ fully distributed cost (FDC) methodologies. These carriers argue that in deciding whether or not to offer a new service any reasonable firm will make its decision based on whether the anticipated revenues from the service will exceed the additional costs of operating the service. Thus, these carriers argue that any direct costs incurred by the service should be allocated to that service, but that its use of existing facilities, which creates no new costs, should not cause any costs to be allocated to the service. These carriers further argue that failure to adhere to an incremental cost policy will cause carriers to refrain from providing certain new services or will cause them to provide services at higher prices than would be economically optimal. They contend that such pricing policies disadvantage both consumers of new services, who have to pay the higher prices, and ratepayers, who are required to bear the entire costs of facilities when additional services are not offered.[261]

228. MCI, RCA, Comptel, Honeywell, and other parties argue that we should require carriers to allocate joint and common costs according to traditional FDC methods. They argue that the cost allocation plans that we have approved for enhanced services and CPE in the past have all allocated joint and common costs on the basis of factors rationally related to the activities in question and suggest that, under an FDC methodology, many joint costs, such as those related to switching and other equipment, could be allocated on the basis of minutes of use. They further contend that carriers install switching capacity and other network services facilities based on their view of the demand for such facilities, including enhanced services. They then argue that under an incremental cost approach to accounting for enhanced services, the costs of such facilities will not be reflected in the price of carrier-provided enhanced services and ratepayers will not receive any of the revenues from those unregulated services, even though those services make use of facilities acquired by ratepayer funds. They argue that this failure to allocate joint and common costs in a proper manner will enable carriers to underprice their

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[261] *See* Ameritech Comments at 36 n. 37.

competitors' enhanced service offerings and will distort carriers' investment decisions.

229. Several parties[262] further argue that, to implement an FDC methodology, the costs of jointly used facilities should be assigned using an "imputed rent" analysis. They contend that a carrier that uses facilities paid for by ratepayers as a part of an unregulated service should be required to reimburse ratepayers at "full market value" for the use of those facilities.[263] Ad Hoc suggests an illustrative example, arguing that if a dominant carrier owns an office building and leases excess space to an unaffiliated entity, it will charge the market value rent, which is treated as above-the-line operating income. Ad Hoc then argues that the result should be no different if the space is allocated to an unregulated activity.[264] Ad Hoc and other parties argue that only by using this type of approach to allocate the costs of jointly used facilities are ratepayers properly compensated for their contribution to the unregulated services.

230. A number of parties also argue that we should not follow the "Joint Plan for Deregulation" (Joint Plan) under consideration by the Iowa State Commerce Commission, which we indicated in the *Notice* might serve a workable accounting model for enhanced services. They argue that, even though the Joint Plan might have some benefits in some circumstances, it would have serious flaws as applied to carrier provision of enhanced services. For example, AT&T argues that the Joint Plan does not provide any methodology for removing unregulated costs from the jurisdictional separations process, and consequently interstate ratepayers would have to bear a portion of these unregulated activities. AT&T further argues that the Joint Plan provides for keeping memorandum records rather than the separate books of account we have required in the past. AT&T also argues that the pooling concepts at the core of the Plan may not be workable for all types of assets and could complicate the process of accounting for retired assets. No party provided strong support for the Joint Plan as the model for enhanced services accounting procedures.

231. Several parties representing different segments of the telecommunications industry[265] argue that, regardless of whatever cost allocation methodology we eventually conclude is appropriate, we should institute a separate proceeding dealing with the

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[262] CBEMA, CompuServe, Tymnet, and Ad Hoc, among others.

[263] *See* Ad Hoc Reply Comments at 30.

[264] *Id.*

[265] ADAPSO, BellSouth, Comptel, IBM, and MCI.

problems of accounting for carriers' unseparated provision of enhanced services or at least should attempt to provide uniform accounting procedures for all dominant carriers. They argue that uniformity is essential to ensure that like transactions are handled similarly so that comparisons between companies and analyses of operating results can be accomplished meaningfully and with a minimum of resources. They further argue that failure to prescribe uniform accounting procedures applicable to both AT&T and the BOCs will make "the task of evaluating compliance with the rules much more time-consuming and, therefore, more subject to regulatory delay and uncertainty."[266] Some of these parties, primarily state regulators, argue that, in order to achieve such uniformity, we should involve the states, NARUC, or the Federal/State Joint Board.

232. In addition to addressing the substance of the cost allocation procedures we might adopt, a number of parties comment on the review procedures we should follow in implementing any cost allocation plans. ADTC, AAR, CBEMA, IBM, IDCMA, Kentrox, Lee and others argue that before we allow AT&T or the BOCs to implement relief from the structural separation requirements, we should review their cost allocation plans after a period for public comment. They argue that we should not adopt the review procedures we employed for AT&T's unseparated provision of CPE in the *AT&T Structural Relief Order*. In that Order, we permitted relief from structural separation to become effective after an initial review of AT&T's cost allocation plan by the Common Carrier Bureau, but prior to providing the public with an opportunity to comment on the plan. They argue that our reliance on post-implementation, true-up procedures in that case was misplaced and would not provide effective protection against AT&T or BOC implementation of inadequate cost allocation procedures for their enhanced service offerings. On the other hand, AT&T and several BOCs argue that the review procedures we employed for AT&T's cost allocation plan in the *AT&T Structural Relief Order* were fully adequate to protect the public interest and avoided the potentially lengthy and unnecessary delays in providing service to the public that would have resulted from pre-implementation review of AT&T's accounting procedures for CPE. A number of parties also contend, however, that even with a pre-implementation review, any enhanced services cost allocation plans should still be subject to

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[266] ADAPSO Reply Comments at 42.

yearly audits by an independent auditor to ensure that they are being properly implemented.

233. Finally, a few parties address the *Notice's* request for comments on whether we should: (a) continue our *Computer II* requirement that AT&T and the BOCs file capitalization plans detailing transfers of capital from their regulated operations to unregulated affiliates; and (b) impose additional forms of "border-patrol" regulatory monitoring for capital transfers from the regulated operations of such carriers to their unregulated activities.[267] BellSouth and others argue that special capitalization reporting requirements are unnecessary, given existing federal and state tariff and facility regulations as well as the carriers' existing disclosure obligations for securities law purposes. Commenters such as CP National, Florida Citizens, Pennsylvania Consumers and others contend that the most substantial problem in this area is the inclusion in regulated operations of assets and costs that should be attributed to unregulated activities, rather than the transfers from regulated operations to unregulated activities that capitalization reporting seeks to control. However, IDCMA, ADCU, and others contend that capitalization safeguards are necessary to prevent degradation of the quality of basic services and to monitor carrier compliance with our policies.

(2) Discussion

234. One of our primary considerations in developing safeguards for the participation of regulated common carriers in unregulated activities is to prevent them from improperly shifting costs from their unregulated to their regulated offerings. Such cost-shifting can have adverse impacts on ratepayers, by improperly increasing the prices they pay for their use of regulated services, and on competition in unregulated markets, by providing an opportunity for carriers to charge artificially low prices for their unregulated goods and services. Thus, even though we have now concluded that structural separation should no longer be required for the provision of enhanced services by AT&T and the BOCs, we remain concerned that, unless checked in some fashion, they would be able to shift costs properly attributable to their enhanced services offerings to those regulated services for which

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[267] *See Notice* at paras. 58–59, 69(d).

they still have market power.

235. In the *Notice*, we suggested several alternatives that might serve as a basis for appropriate cost allocation procedures to limit the ability of AT&T and the BOCs, in the absence of structural separation, to engage in such improper cost-shifting. One possibility we suggested was to develop cost allocation procedures based on the approach contained in the Joint Plan.[268] However, in light of the substantial objections to that proposal voiced in the record, we do not believe that it is the appropriate model for the further development of cost allocation procedures for enhanced services. An alternative approach suggested in the *Notice* is to initiate a general proceeding on the allocation of joint and common costs for the unregulated activities of all carriers. While we have revised Part 31 of our rules to establish provisions to account for carriers' nonregulated activities using separate books of account in CC Docket No. 81-893, we deferred to a subsequent proceeding the establishment of procedures for allocating joint and common costs between regulated and nonregulated activities. In the *Notice*, we suggested that this joint cost proceeding would be the appropriate forum to develop detailed cost allocation rules for AT&T's and the BOCs' unseparated provision of enhanced services. We recently adopted the *Joint Cost Notice* initiating this proceeding, and we believe that it provides the most appropriate forum to develop the cost allocation procedures that, in conjunction with our efforts to promote the development of Open Network Architectures, will provide for the long-term regulation of enhanced services provided by AT&T and the BOCs in the absence of structural separation.[269]

236. While we believe that the *Joint Cost Notice* provides the proper vehicle for the development of final cost allocation procedures for the unseparated provision of enhanced services, that proceeding may not be completed until late 1986 or early 1987. Therefore, to permit carriers currently subject to structural separation to engage in the unseparated provision of enhanced services pending the adoption of a final order in the *Joint Cost* proceeding, we will establish interim cost allocation procedures. Before AT&T and the BOCs begin joint planning, research, or development of enhanced services beyond that authorized by our

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[268] *Notice* at para. 69 n. 54.

[269] To aid our efforts in that proceeding to develop cost allocation procedures that reflect the concerns expressed here on the unseparated provision of enhanced services by AT&T and the BOCs, we will include in the record for that proceeding the comments and reply comments on cost allocation issues filed in response to the *Notice*.

current *Computer II* policies, they must file interim cost allocation plans relating to such activities. We require AT&T and the BOCs to base any interim cost allocation plans for specific enhanced services on the cost allocation procedures we propose in the *Joint Cost Notice*. Since that Notice proposes alternative methods for allocating joint and common costs, we will permit carriers filing interim cost allocation plans to select the option that is most consistent with their existing business procedures. This should minimize the costs imposed in the implementation of interim procedures. Moreover, our review of interim cost allocation plans filed in accordance with the different options proposed in the *Joint Cost Notice* may provide useful experience on the relative strengths and weakness of each of the options. Because we believe that these plans will only be interim measures, we conclude that the review procedures proposed in the *Joint Cost Notice* will be inappropriate, and instead require entities to file plans that we will review subject to the same procedures we are establishing for the review of CEI plans.[270]

237. We also require interim plans that remain in force for a year or more to be submitted to an annual attestation audit by an independent auditor at the carriers' expense. Such an audit is the best means of ensuring the carriers are following the procedures established in their interim accounting plans, especially given the substantial demands already placed on our limited resources by the pre-implementation review of interim plans and the development of permanent accounting procedures.

238. Because we are replacing structural separation for AT&T and the BOCs with nonstructural safeguards, the capitalization plan filing and updating requirements now in effect[271] will lapse when structural separation is removed. We conclude that no such requirements should be imposed as nonstructural safeguards. In *Computer II*, the focus of our scrutiny of capitalization plans for transfers of assets from carriers' regulated operations to their unregulated separate subsidiaries was to control the potential for inappropriate subsidies that would harm basic service ratepayers and to ascertain that the separate subsidiary would, at some determinate time, be able to establish its financial independence

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[270] *See supra*, paras. 190–91. In general, interim cost allocation plans will be filed by the carriers and public comment will be invited. If, after receiving comments and reviewing the plans, we find that they are acceptable and other conditions have been satisfied, we will permit the carriers to begin the unseparated planning, research, or development of the enhanced services covered by the plans.

[271] *See 47 CFR § 64.702(d)(4).*

and assume for itself the risks associated with its competitive ventures.[272] Our experience with the existing capitalization requirements indicates that these legitimate concerns are more effectively addressed by regulatory measures that are less burdensome to both the carriers and this Commission. In particular, it appears that carrier entry into unregulated areas will not lead to massive hemorrhaging of capital from regulated operations. Indeed, as commenters emphasize, a more cogent concern is the improper attribution to regulated operations of investment and expenses that should be allocated to unregulated activities.[273]

239. Thus, we conclude that the goals of the capitalization requirements, to prevent potential degradation of basic services and to control increases in the costs of capital for regulated activities due to significant investments in unregulated activities, can be addressed adequately by conventional tariff and facilities regulation at the state and federal levels. This Commission and, we trust, the states, will take prompt action to control any distortions in basic service quality or rates caused by carrier activities in unregulated areas.

240. For these reasons, we further tentatively conclude that the capitalization plan filing and updating requirements of 47 CFR § 64.702(d)(4) should be eliminated from the structural separation requirements that continue to apply to AT&T and the BOCs pending compliance with the nonstructural safeguards of this *Order*. We request comment on this tentative conclusion in the *Supplemental Notice*.

b. Network Disclosure Obligations of AT&T and the BOCs.

(1) Positions of the Parties.

241. Virtually all parties commenting on network disclosure agree that carriers should be under some obligation to disclose information about changes in their basic network services to entities attempting to develop enhanced services that rely on those basic services. Many parties also agree that a key element of the existing disclosure rules, the requirement that AT&T and the BOCs disclose to the public any information disclosed to their separate subsidiaries or to third parties forth benefit of their separate subsidiaries, will not be enforceable in the absence of structural separation. A number of commenters argue that we should replace the existing rules with the network disclosure

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[272] *Final Decision*, 77 FCC 2d at 485, para. 258.
[273] *See, e.g.*, Pennsylvania Consumers Comments at 5–7.

procedures we adopted in the *AT&T Structural Relief Order* for AT&T's unseparated CPE operations, which require disclosure at the "make/buy" point or at a minimum 6 months before the introduction of a new network service.[274] They argue that enhanced service providers do not require information about new or changed network services any sooner than CPE vendors do. They contend that, because providers of enhanced services use computers or other CPE to create software, if CPE can interconnect to a common carrier network service, then an enhanced service provider can interconnect as well. Furthermore, they argue that even though those disclosure requirements were developed for AT&T, the BOCs are in a similar position with respect to the disclosure of network information, and thus the same requirements should be applied to both AT&T and the BOCs.

242. Several parties, while generally supporting the application of the disclosure requirements established in the *AT&T Structural Relief Order* to enhanced services, argue that carriers may interpret these requirements as allowing the integrated planning and development of enhanced services with network services prior to the point at which the disclosure obligation attaches. CBEMA and Xerox argue that, at a minimum, we should require carriers to maintain service development records to enable us to determine the time period during which a new enhanced service was under development, which could be compared against the point in time at which information was disclosed to the public.[275] They argue that such methods would aid us in assessing whether any unfairness is occurring under the disclosure rules.

243. Other commenters, including some providers of network services and NTIA, argue that the conditions adopted in the *AT&T Structural Relief Order* may be more onerous than necessary. They argue that carriers' ability unilaterally to set network standards is not great since almost all standards for the network are set by standards organizations such as the T1 Committee,[276] and individual carriers must conform to these standards in developing or modifying their network services. Several carriers further argue that carriers would be motivated by market forces to provide information about developments in their networks to encourage as many parties as possible to make use of their network services. They argue that attempting to manipulate this

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[274] Ameritech, AT&T, Bell Atlantic, CBEMA, DEC, DOJ, PacTel, Southwestern Bell, and Xerox among others.

[275] *Seed CBEMA Comments at 47.*

[276] *See supra* note 125.

information flow would alienate potential customers and drive them to alternative providers of basic services. Some commenters further argue that the disclosure rule adopted in the *AT&T Structural Relief Order* is overly intrusive and, in any event, may be difficult to implement in the enhanced services environment. These parties argue that market forces, or at most, the "All Carrier Rule" — requiring reasonable advance disclosure — will be sufficient to ensure adequate disclosure.

244. Several commenters, among them ADAPSO and GTE, argue that while the disclosure conditions established in the *AT&T Structural Relief Order* may be sufficient for CPE, they need to be modified before they can be applied to enhanced services. ADAPSO and GTE contend that CPE interfaces to the basic network are primarily dependent on the design of hardware components within the network, and make/buy decision for the components may occur at reasonably clear points in time. They argue that in contrast, that enhanced services are often not based on hardware, but on software-driven network services and characteristics. They further argue that this software is often developed internally by the carrier on a continuing basis, and there is no clear point at which explicit make/buy decisions are reached.[277] GTE argues that in order to remedy this problem we should require disclosure at the earlier of: (a) the make/buy point for hardware or software needed to implement a network change or new network feature; or (b) the point when the carrier makes a committment to develop an enhanced service that depends on the network change or feature.[278] ADAPSO generally supports the changes suggested by GTE, but argues that any reference to the make/buy point should be deleted since it is not easily defined in conjunction with network changes not involving CPE interconnection. ADAPSO proposes that the first part of the proposed GTE rule be changed to require disclosure at the point when a carrier commits to produce itself or to procure from an unaffiliated entity, any hardware or software needed to implement a new network feature or network change.[279] ADAPSO further proposes that if the Commission retains nondisclosure agreements as part of the disclosure process, disclosure occur within 15 days after a vendor signs an agreement rather than the 90 days the *AT&T*

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[277] *See* GTE Comments at 51–52.

[278] *Id.* at 53–54.

[279] ADAPSO Reply Comments at 50.

Structural Relief Order provided.

245. Finally, several parties argue that, contrary to the assertions by the BOCs and AT&T, network disclosure requirements substantially more stringent than those adopted for AT&T in the *AT&T Structural Relief Order* are appropriate.[280] Lee and RCA argue that enhanced service providers require greater, and more timely, access to network service information than is provided to CPE vendors. They contend that enhanced services interact with, and are dependent on, network facilities in a significantly greater and more complex way than CPE; thus, they conclude, it is essential that enhanced service providers have access to technical information at the same time, and of the same quantity and quality, as the dominant carrier provides its personnel who are responsible for developing enhanced services.[281] NATA argues that the only way to effectuate "equal access" to technical information is to continue at least a limited form of separation applicable to enhanced and network services marketing personnel. Other parties argue that there is no good way at present to preserve such "equal access"; therefore, they assert, we should initiate a separate proceeding to develop new disclosure procedures and retain structural separation in the interim.[282]

(2) Discussion

246. There is virtually complete agreement among the parties commenting in this proceeding that AT&T and the BOCs should be under some obligation to disclose information about their networks to their enhanced services competitors to enable those competitors to develop compatible enhanced services. The primary disagreements concern the events that should trigger disclosure and the scope of the information that must be disclosed. We conclude that the disclosure rules we adopted for AT&T's provision of CPE in the *AT&T Structural Relief Order*,[283] with some minor alterations and clarifications, will ensure that important information about the networks of AT&T and the BOCs will

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[280] Lee, NATA, RCA, and Tymnet, among others.

[281] *See* Lee Reply Comments at 63.

[282] Tymnet Reply Comments at 72.

[283] *AT&T Structural Relief Order*, 102 FCC 2d at 684–88, paras. 49–54.

be transmitted in a timely fashion to the enhanced service providers who require it.

247. Under our existing structural separation rules for enhanced services, AT&T and the BOCs are required to disclose network information when either of two events occurs.[284] First, such disclosure is required whenever these carriers transmit information to their enhanced services separate subsidiaries or to third parties for the benefit of the separate subsidiaries. Second, disclosure is also required at the point of a make/buy decision if joint research and development is conducted by enhanced services and network services personnel.

248. In the absence of structural separation, the first part of this rule — requiring disclosure when information is transmitted to the separate subsidiary — will no longer provide a workable standard for disclosure of network information since separation between enhanced services and network services personnel will no longer be required.[285] We could, as some parties suggest here, and as was suggested in the AT&T CPE proceeding, continue to require that technical or other information be made public as soon as any carrier personnel involved in the design, development, manufacturing, or marketing of enhanced services were provided with such information.[286] However, in the *AT&T Structural Relief Order*, we found that such a disclosure rule applied to CPE personnel could lead to the premature disclosure of network information or could cause AT&T to reinstitute the same types of artificial and inefficient restraints on internal information flows that were imposed by structural separation.[287] We believe that those findings are equally applicable to enhanced services and conclude that this type of disclosure requirement is not in the public interest.

249. Another approach suggested in the comments would involve retaining some form of limited structural separation between enhanced and network services marketing personnel and requiring disclosure of network information when it is disclosed to enhanced services marketing personnel.[288] For a number of reasons, we do not believe that this approach is acceptable either. First, continuing structural separation requirements for the marketing personnel for enhanced and basic services would eliminate

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[284] *See supra* para. 15.

[285] *See AT&T Structural Relief Order*, 102 FCC 2d at 684–85, para. 50.

[286] *See AT&T Structural Relief Order*, 102 FCC 2d at 684–85, para. 50.

[287] *Id.*

[288] *See* NATA Reply Comments at 18.

some of the benefits that removing these requirements can provide to enhanced services consumers and network services ratepayers in the form of efficiencies from jointly marketing both types of services.[289] Furthermore, AT&T and the BOCs would not be permitted to provide the integrated systems solutions we have determined would be in the public interest. Second, it is not clear that permitting carriers to withhold informatin about changes in the network until such information is disclosed to marketing personnel would necessarily provide disclosure in a timely manner. Under this proposed rule, carriers would be permitted to develop enhanced services based on changes in the network and would not have to disclose such information until they informed their enhanced services marketing personnel. Depending on how broadly the term "marketing personnel" is defined, this approach could, in at least some cases, permit substantial development work to take place before disclosure is made. As a result, this might not provide competitors with sufficient opportunity to develop new enhanced services based on changes in the network and could provide carriers with a substantial headstart in their development of new enhanced services.

250. We conclude that in order to provide enhanced service providers with adequate time to develop new services based on changes in the network, the standard contained in the *AT&T Structural Relief Order* is the most appropriate trigger for disclosure of network information. In that *Order*, we required AT&T to begin the process of disclosing information at the time a "make/buy" decision occurred — *i.e.*, when AT&T decided to make itself or to procure from some other entity software or hardware involved in implementing a network change or new network services.[290] Disclosure was to occur after CPE vendors wishing to obtain technical or other information had entered into "nondisclosure agreements" with AT&T in which they would agree not to disclose that information outside of their CPE operations. Several parties, although generally agreeing that this rule can be applied in the enhanced services context, argue that the nature of enhanced services reduces the relevancy of the "make/buy" decision as a definable point in the development of network services affecting enhanced services. They argue that we should modify or eliminate any reference to "make/buy" decision so as to

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[289] Although the *Sales Agency Order* and the *Bell Atlantic Centrex Waiver Order* permit some joint activities by the BOCs' basic services organizations and their separate subsidiaries, such activities are limited in scope.

[290] *AT&T Structural Relief Order*, 102 FCC 2d at 686-87, para. 53.

require disclosure when a carrier decides to implement a network service change, or when a carrier commits to developing a new enhanced service based on changes in the network, whichever is earlier.[291] While we believe that the points raised in the comments have some validity with respect to their characterization of the network disclosure requirements as applied to enhanced services, we do not believe they accurately characterize the disclosure rule we adopted in the *AT&T Structural Relief Order*, which we conclude addresses the problems they raise.

251. The rules we established in the *AT&T Structural Relief Order* require disclosure of network information at the time AT&T "makes a decision to manufacture . . . or procure . . any product the design of which *affects or relies* on the network interface . . ."[292] Thus, a decision to manufacture or produce a product for implementing a change in the network or a new network service is, we believe, equivalent to a commitment to develop such a service — especially since we have specifically included the development of software as one element of a "make/buy" decision. Furthermore, any decision by AT&T to manufacture or procure hardware or to develop software for any service relying on the new or modified network interface would be a make/buy decision.[293] Therefore, we conclude that the rule we adopted in the *AT&T Structural Relief Order*, when applied in the enhanced services context, adequately addresses the concerns of some parties about the transferability of the make/buy concept out of the CPE context.

252. Under the network disclosure obligation we establish today, starting at the time that AT&T and the BOCs begin joint planning, research, or development of enhanced services, they will be required, for all new network services or changes to existing network services that affect the interconnection of enhanced services with the network, to notify the enhanced services industry that such a change is planned.[294] Such notification will

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[291] *See supra* para. 244.

[292] *AT&T Structural Relief Order*, 102 FCC 2d at 660, para. 8 [emphasis added]. "Product" was defined to include "any hardware or software for use in the network which might affect the compability of CPE or enhanced services with the existing telephone network, or with any new basic network services or capabilities. Product also includes, for purposes for a make/buy determination, the development of any hardware or software that relies on the network interface." *Id.* at 686, para. 53 n. 84.

[293] As we specifically indicated in the *AT&T Structural Relief Order*, if "AT&T makes a decision to develop a new kind of CPE based on a planned interface, that decision will trigger the disclosure obligation." *Id.* at 686, para. 53 n. 84.

[294] *See infra* para. 253 for the methods we are requiring AT&T and the BOCs to

take place at the time AT&T or any BOC makes a decision to manufacture itself or to procure from an unaffiliated entity, any product the design of which affects or relies on the network interface. "Products" in the enhanced services context includes any hardware or software for use in the network that might affect the compatibility of enhanced services with the existing telephone network or with any new basic services or capabilities. "Products" also includes any hardware, software, or services that rely on the network interface.

253. While we believe that the timing of disclosure should be the same for AT&T and the BOCs, certain differences between them may require different methods of disclosure. Although we conclude that the benefits we found in the *AT&T Structural Relief Order* from the use of nondisclosure agreements as part of the disclosure process for AT&T's provision of CPE will also exist for its provision of enhanced services,[295] we also conclude that the use of these agreements may create problems for those enhanced service providers that also provide basic services, and we have decided to address this issue in the *Supplemental Notice*. As an interim measure, because of the benefits we have found from their use, we will permit AT&T to require nondisclosure agreements when disclosing information about new or changed network services that affect enhanced services interconnection. Therefore, at the time the disclosure obligation attaches,[296] AT&T will be required to notify the enhanced services industry (through direct mailings, trade associations, or other reasonable means) that a network change or network service is under development. The notice need not contain technical information, but it must describe the proposed network service with sufficient detail to allow the enhanced services industry to understand what the new service is and what its capabilities are. The notice must also indicate that technical information required for the development of compatible enhanced services will be provided to any entity involved in the provision of enhanced services and may indicate that such information will be made available only to such entities willing to enter into a "nondisclosure agreement."[297] Once an entity has

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follow for the dissemination of information once the disclosure obligation attaches.

[295] *See AT&T Structural Relief Order*, 102 FCC 2d at 686–87, at para. 53.

[296] *See supra*, para. 250.

[297] For a detailed description of nondisclosure agreements, see *AT&T Structural Relief Order*, 102 FCC 2d at 686–87, para. 53. We recognize that some enhanced service competitors that would enter into nondisclosure agreements with AT&T may rely on other firms to supply them with hardware and

contacted AT&T and signed a nondisclosure agreement, AT&T must provide the full range of information required in the *AT&T Structural Relief Order* within a reasonable period,[298] but not to exceed 30 days.[299]

254. In addition, for those entities that are unwilling to enter into nondisclosure agreements, we adopt the approach of the *AT&T Structural Relief Order* and require that AT&T publicly disclose all technical information at least six months prior to the introduction of a new service or network change that affects the interconnection of any enhanced service with the network and marketing information at the general announcement of the service or change.[300] As we indicated in the *AT&T Structural Relief Order*, we intend that this disclosure requirement be implemented so as to provide entities in the enhanced services industry that require AT&T network information with effective access to that information, but we do not intend that AT&T's network services competitors be included in the disclosure process.[301]

255. For the BOCs there appears to be less of a need for the nondisclosure agreements we have permitted AT&T to employ in its disclosure of network information. As we indicated in the *BOC Structural Relief Notice*, when we allowed AT&T to utilize nondisclosure agreements we believed that if it were required to disclose to the public at the make/buy point, its network services

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software components for their enhanced service offerings. To supply such components, these other firms might need access to the network information that would be the subject of the nondisclosure agreements. We request comment in the *Supplemental Notice* on the most appropriate ways of permitting such firms to access this information. In the interim we require all nondisclosure agreements to contain provisions permitting an enhanced services competitor that enters such an agreement to disclose the subject network information to such supplying firms, provided that the latter agree to be bound by the same terms and conditions of the nondisclosure agreements.

[298] For a discussion of the type of information that must be disclosed see *AT&T Structural Relief Order*, 102 FCC 2d at 686-87, para. 53. *See also Disclosure Order*, 93 FCC 2d at 1236-1238, paras. 31-38.

[299] In the *AT&T Structural Relief Order*, we permitted AT&T up to 90 days to make information available to CPE vendors and others. A number of commenters in this proceeding have argued that 90 days is too long and a shorter period should be adopted. We agree that for enhanced services, a period shorter than 90 days is appropriate and that 30 days should be sufficient to permit AT&T to prepare information for dissemination. A number of parties have sought reconsideration of the 90-day time period established in the *AT&T Structural Relief Order* for CPE, and we expect to address that and other issues raised on reconsideration in that proceeding in the near future.

[300] *AT&T Structural Relief Order*, 102 FCC 2d at 688, para. 54. In the *Supplemental Notice*, we request comment on whether this six month period be changed to twelve months.

[301] *AT&T Structural Relief Order*, 102 FCC 2d at 688, para. 54.

competitors would obtain premature access to its network design information and, consequently, an artificial and unfair competitive advantage. Because the BOCs do not currently face the same degree of competition in their provision of network services, we tentatively conclude disclosure to the public will not have as adverse an impact on their ability to innovate in the network as it would for AT&T. Therefore, as an interim measure pending the adoption of final safeguards for the BOCs and the resolution of the questions surrounding the use of nondisclosure agreements in the *Supplemental Notice*,[302] when a disclosure obligation attaches at the make/buy point[303] the BOCs will be required to disclose to the public (through direct mailings, trade associations, or other reasonable means) the full range of information rquired in the *AT&T Structural Relief Order*.[304] Finally, such public disclosure should occur at least six months before the introduction of a new network service or network change that affects the interconnection of any enhanced service with the network.

c. *Customer Proprietary Network Information.*

(1) Positions of the Parties.

256. A substantial number of commenters — primarily user groups, enhanced service vendors, and CPE providers — argue that dominant carriers enjoy special access to the customer proprietary network information (CPNI) of subscribers to their network services and that this information can be very useful in marketing enhanced services.[305] For example, CBEMA argues that customers' circuit design and service usage records would provide useful information on whether particular customers use enhanced services, who the enhanced services vendors are, and what the current levels of service are. Other parties further argue that enhanced services vendors are captive customers of AT&T and the BOCs since they must use those carriers' network services in order to offer their competing enhanced services. Thus they contend that, by gaining access to the circuit and usage records of competing vendors, AT&T and BOC enhanced service

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[302] Because these exact issues with repect to BOC CPE activities are currently under examination in the *BOC Structural Relief Notice*, we will defer a final decision on the methods the BOCs must follow in disseminating network information with respect to their enhanced services activities to the *Supplemental Notice*. *See Supplemental Notice* at para. 52.

[303] *See supra*, para. 15.

[304] *See supra*, note 297.

[305] ADAPSO, ADTC, ANPA, ARI, ADCU, CBEMA, CompuServe, ICA, IDCMA, Kentrox, Lee Tymnet, Xerox and others.

affiliates can quickly identify the customers of competing vendors and attempt to market services to them. In addition, several parties argue that carriers can use their databases to generate aggregate information on usage levels and traffic patterns for the network services in their service areas, which would be of substantial value in the technical and economic design of enhanced services.[306] Finally, a number of telecommunications users and user groups argue that certain CPNI held by carriers may reveal information concerning businesses' manufacturing or marketing processes, new services, plans for territorial expansion, and other information that businesses would want to be kept from any disclosure.

257. Parties contend that we ought to impose restrictions on carriers' ability to use the CPNI in their possession in marketing enhanced services. They further argue that the restrictions we adopted in the *AT&T Structural Relief Order* — requiring AT&T, at the customer's request, to provide CPNI to competitive CPE providers or to provide confidential treatment for CPNI — may not be sufficient. CBEMA contends that we should expand those conditions to require carriers to provide their customers with advance notice that CPNI is being used in making an enhanced services proposal. CBEMA further suggests that when the customer is provided with notice it should be given the option of prohibiting the carrier's use of such information and of designating other enhanced services vendors that could receive the information.[307] Other parties argue for a more comprehensive version of the CBEMA proposal under which carriers would be prohibited from releasing CPNI to any unaffiliated entity, or to affiliated personnel not involved solely in the sales or provision of basic services, unless the customer has provided written authorization for such release.[308] They contend that these types of restrictions on carrier use of CPNI would provide all enhanced services providers with equal access to carrier-controlled CPNI and would address the privacy concerns of end-users.

258. AT&T, the BOCs, other exchange carriers, and NTIA disagree that CPNI is an important competitive problem and argue that restrictions such as those proposed by some commenters are not required. They contend that the restrictions imposed on AT&T's use of CPNI in the *AT&T Structural Relief Order*, or lesser restrictions, are sufficient. They argue that CPNI is not

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[306] *See* Lee Reply Comments at 61.
[307] *See* CBEMA Comments at 53, n. 45.
[308] ADAPSO, ADCU, ICA, IDCMA, and Tymnet, among others.

especially useful in predicting an end-user's enhanced services requirements since such requirements are more likely to be dependent on the capabilities of the customer's CPE and data equipment. They further argue that the information most likely to be of use in marketing enhanced services to a customer is knowledge of the industry in which that customer operates and the specific way in which it conducts its business. They suggest that this type of information is equally available to all enhanced services competitors. In addition, several carriers take the position that use of customer data is part and parcel of any competitor's ability to market its own services based on its own best information.[309] They note that we place no restrictions on IBM's ability to use any information at its disposal, including extremely valuable information on the data processing needs of many major corporate customers, in marketing enhanced services and contend that restrictions on their intra-corporate use of information will impede their ability to compete. These carriers do acknowledge, however, that it would be unfair for carriers to use their enhanced services competitors' CPNI to market enhanced services to their competitors' customers. Finally, these carriers suggest that the requirements proposed by CBEMA and others would impose a burden on all contacts between carriers and their customers, would substantially increase the difficulties attendant with providing customers a single point of contact, and prove extremely expensive to implement.

259. AT&T further argues that, even assuming that CPNI can be of some use to carriers in marketing enhanced services, the most valuable information would be that controlled by exchange carriers. It indicates that approximately 95 percent of all voice messages are local and intraLATA toll, and CPNI regarding this usage is of much greater marketing significance than the CPNI held by AT&T. AT&T further notes that it has no access to any information about the interLATA usage of those end-users using the services of its interexchange competitors. Thus, AT&T argues that it has no overwhelming advantage stemming from CPNI, and the conditions specified in the *AT&T Structural Relief Order* will

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[309] *See* Anchorage Telephone Comments at 14–18; Bell Atlantic Comments at 14–15; US West Comments at 90.

fully alleviate any problems that may arise.

(2) Discussion.

260. We concluded in the *AT&T Structural Relief Order* that in the absence of structural separation our rule prohibiting carriers from providing CPNI to their separate subsidiaries unless such information is provided to the public would no longer be applicable to AT&T's unseparated CPE operations.[310] We further found that there was no easy way to provide equality of access to CPNI without (a) imposing broad restrictions on joint marketing by AT&T, which would be inconsistent with the removal of structural separation, or (b) in effect making CPNI generally available to all CPE vendors, which would be inconsistent with legitimate customer expectations about confidentiality. However, we did determine that there were certain steps we could take to make CPNI available to competing vendors, while at the same time preserving its confidentiality. First, we required AT&T to make a customers' CPNI available to competing CPE vendors at the customer's request to ensure that all vendors would have access to the information they would require to design a communications system or prepare a competing bid for a customer.[311] Second, we determined that some customers of AT&T Communications might desire that their CPNI be available only to network services personnel who are not involved in CPE sales and we required AT&T to establish procedures that would permit customers to obtain network services on that basis.[312] We concluded, based on our finding that AT&T only has useful CPNI for its largest and most sophisticated customers, that these procedures were sufficient to address the concerns raised by CPNI in the absence of structural separation.[313]

261. We believe that the CPNI requirements we imposed on AT&T in the *AT&T Structural Relief Order* are also sufficient to address the concerns raised by AT&T's unseparated provision of enhanced services. The primary problem raised in the record is the potential for carriers to use the CPNI in their possession to market enhanced services to their competitors' customers. In

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[310] *AT&T Structural Relief Order*, 102 FCC 2d at 692, para. 63.

[311] *Id.* at 693-94, paras. 65-66.

[312] *Id.*

[313] We found that the marketing advantage conferred by AT&T's access to CPNI for such customers is substantially mitigated by the fact that these customers are likely to be sophisticated consumers of telecommunications products and services that will solicit bids from several CPE manufacturers before any purchase is completed. *Id.* at 693, para. 65.

theory, carriers can identify potential customers directly from their competitors' CPNI or indirectly by using the CPNI of those customers that access competitors' enhanced services through dedicated facilities. An additional problem is the concern of some user groups that the telecommunications information of some businesses is highly proprietary in nature and should not be disseminated to carrier personnel not involved in the provision of network services. We conclude that each of these concerns is adequately addressed by the confidentiality requirements we established in the *AT&T Structural Relief Order*. Those network services customers that are also providers of enhanced services can request confidentiality for their CPNI, and if their enhanced services customers are served by dedicated facilities, can order those facilities themselves or ask their customers to request confidential treatment for the CPNI relating to those facilities. In addition, those businesses that are concerned about the proprietary nature of their telecommunications information can request confidentiality for their CPNI.

262. We further conclude that, for the reasons we articulated in the *AT&T Structural Relief Order*, the requirement that carriers make a customer's CPNI available to enhanced service providers at the customer's request will be sufficient to allow enhanced service providers to obtain the information they need from AT&T to design enhanced services offerings for potential customers.[314]

263. However, the commenters have raised one area of concern not presented by the unseparated provision of CPE — carrier access to aggregated information that can be used to design and market enhanced services. We tentatively find that making such information available to all providers of enhanced services would be in the public interest. However, because the exact nature of the information that would be most valuable has not been defined in the record compiled thus far. Therefore, we will defer any decision on this issue until we have received further comment in response to the *Supplemental Notice*.[315]

264. While we believe that the procedures we established in the *AT&T Structural Relief Order* are sufficient for AT&T, we are concerned, as we were in the *BOC Structural Relief Notice* dealing with the unseparated provision of CPE by the BOCs, that the problem implicated by the BOCs' use of CPNI may be greater

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[314] *See id.* at 692–94, paras. 64–67.

[315] We also request comment in the *Supplemental Notice* on the means by which AT&T and the BOCs should be required to notify their customers of these CPNI requirements.

than those we identified for AT&T.[316] In that Notice we proposed, and invited parties to comment on, possible additional procedures for BOC CPNI. Since we have not yet had an opportunity to consider in the BOC CPE proceeding whether to establish any such additional procedures and since parties in this proceeding did not have the opportunity to comment on these specific proposals, we defer to the *Supplemental Notice* the determination of the final procedures we will establish for the BOCs' use of CPNI for their unseparated provision of enhanced services. However, pending the resolution of the issues addressed in the *Supplemental Notice*, we will permit the BOCs to offer unseparated enhanced services subject to the same restrictions we have established for AT&T. Since the BOCs are currently prevented by the *MFJ* from offering most types of enhanced services, and because we expect these interim requirements to be replaced by final safeguards before the end of the year, we do not believe the BOCs' customers or enhanced services competitors will be unduly prejudiced if the BOCs should offer some limited class of enhanced services subject to these interim conditions.

265. To implement the procedures we are establishing for the unseparated provision of enhanced services by AT&T, we require AT&T to file with its first CEI Plan an updated version of the CPNI plan it submitted in response to the conditions we established in the *AT&T Structural Relief Order*. The updated plan should address any differences that may exist between CPE and enhanced services for the confidential treatment of CPNI and should indicate how enhanced services providers can obtain the information they require to make their services available to potential customers. Furthermore, those BOCs wishing to provide enhanced services on an unseparated basis pending the resolution of the issues raised in the *Supplemental Notice* should file with their first CEI Plan a description of the procedures they propose to implement to comply with the requirements we have established for AT&T. They should comply with these interim requirements in a manner that will not prejudice the implementation of additional procedures of the type we propose in the *BOC Structural Relief Notice* and the *Supplemental Notice*. For both AT&T and the BOCs, the procedures we have established for

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[316] *See BOC Structural Relief Notice*, at para. 49.

review of the CEI Plans will apply to their CPNI Plans as well.

V. TREATMENT OF PROTOCOL PROCESSING FUNCTIONS

266. By replacing structural separation with nonstructural safeguards for the provision of enhanced services by AT&T and the BOCs, we have established a new regulatory regime for enhanced services generally that seeks to address the continuing evolution of the telecommunications industry. We now consider whether we should accord different regulatory treatment to the subset of enhanced services known as protocol processing services. The regulation of such services has been a subject of considerable dispute under *Computer II*. We perceive that such disputes may stem, at least in part, from two different facets of protocol processing functions that suggest different types of regulatory treatment. On one hand, the functional operation and utility of these functions suggest that they are essentially neutral for regulatory purposes since they facilitate communications and do not change the information content of a subscriber's message or data. This analysis indicates that protocol processing could properly be treated as an "adjunct" service, which could be offered as part of a regulated basic service, or an unregulated, enhanced service, without changing the nature or regulatory status of either type of service. On the other hand, such functions are features of products and services that presently are offered on an unregulated basis in competitive markets. We have found previously that competition in these markets, and consumers of protocol processing services, are best served by treating these services as enhanced. Moreover, we are quite concerned about unnecessarily reimposing Title II and state regulation on services that can be provided efficiently in competitive markets and that are now unregulated because they include protocol processing. These considerations indicate that a pragmatic and balanced treatment of protocol processing could be to retain the existing enhanced services definition and to apply CEI, Open Network Architecture, and the other nonstructural safeguards developed in this *Order* to the protocol processing functions covered by that definition.

267. We do not propose at this time to modify the enhanced services definition to accomodate these concerns, but shall seek further comment from the public on these issues in the *Supplemental Notice*. We present definitions of the terms "protocol," "protocol processing," and "protocol conversion" for regulatory purposes. We also conclude that the public interest would be

served by the clarification of policies for the provision of protocol processing services pending the resolution of the *Supplemental Notice* issues. Under these policies, the existing enhanced services definition of Section 64.702(a) of our Rules will remain unchanged, and carriers subject to structural separation may continue to offer protocol processing services on an unseparated basis as provided in the *Asynchronous/X.25 Waiver Order* and the *X.25/X.75 Waiver Order*. We shall also permit such carriers to offer other protocol processing services on a collocated basis provided that they comply with the nonstructural safeguards set forth in the preceding section of this *Order*.

A. Alternatives Presented in the Notice

268. Enhanced services are defined in Section 64.702(a) of our Rules. In the *Notice*, we characterized "protocols-type processing" services as those included in that section's first substantive clause, which defines as "enhanced":

> services offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information . . . [317]

The second and third clauses of that section define as "enhanced" those services that "provide the subscriber additional, different, or restructured information,"[318] and that "involve subscriber interaction with stored information,"[319] respectively.

269. Although in the *Notice* we indicated that we wished to develop a revised general regulatory framework for dealing with a broad range of problems associated with the treatment of enhanced services in *Computer II*, we emphasized that the most significant problems have arisen in the context of protocol processing functions.[320] Accordingly, in Part III. B. of the *Notice*, we invited comment on three proposed alternatives for dealing with the specific problems associated with the provision of protocols-type processing by carriers subject to structural separation.[321]

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[317] *See* 47 CFR § 64.702(a). As noted *supra*, note 11, we refer to "protocols-type processing" functions as "protocol processing" functions.

[318] *Id.*

[319] Id.

[320] *Notice* at para. 25.

[321] *Id.* at paras. 70–114.

270. Each alternative in Part III of the *Notice* is a different proposal for permitting carriers now subject to the structural separation requirements to offer protocol processing services on an integrated or collocated basis, subject only to nonstructural safeguards. Alternative 1 would permit such carriers to offer first-clause services on an integrated basis provided they do so "by reselling the underlying services obtained under . . . [their basic service] tariffs."[322] Alternative 2 would permit the collocated offering of protocol processing services, provided that the following nonstructural conditions originally set forth in the *Asynchronous/X.25 Waiver Order* are observed.[323]

> (a) costs associated with the provision of a collocated protocol processing service must be maintained in below-the-line accounts;
>
> (b) interconnection with the basic service facilities of the dominant carrier affiliate must be under tariff;
>
> (c) cost savings resulting from collocation may be reflected in the tariff governing the interconnection of protocol processing facilities to the basic network provided that these are identified in terms of the loop costs avoided;
>
> (d) a network utilization rate element (NURE) that reflects any basic service switching inefficiencies that might result from the integration of protocol processing and basic service switching must be included in basic service tariffs;
>
> (e) interconnection of end users to the protocol processing facilities of either the carrier or of competing enhanced service providers must be provided on a nondiscriminatory basis.[324]

Alternative 2, like the *Asynchronous/X.25 Waiver Order*, would not permit carriers subject to structural separation to market protocol processing and basic services on a joint basis.

271. Alternative 3 would leave the three-clause definition of "enhanced services" intact, but would create another service category titled "network processing" that would subsume the first-clause protocol processing services.[325] Under the Alternative

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[322] *Id.* at para. 98.

[323] While the *Asynchronous/X.25 Waiver Order* applies only to one particular type of protocol conversion, under Alternative 2 these conditions would apply to all the enhanced services of carriers subject to structural separation. Since we have established a new regulatory framework for enhanced services generally in this *Order*, we focus our consideration of Alternative 2 here to its application to protocol processing services.

[324] *See Notice* at paras. 101–104.

[325] "Network processing" was defined as "the employment of computer processing applications that act on the format, code, protocol or similar aspects of the subscriber's transmitted information in providing interstate communications." *Id.* at para. 110.

3 approach, carriers subject to structural separation would offer these protocol processing services as basic services, with no restrictions upon collocation, joint marketing, or the use of any of the other support services of the basic service organization. Since the enhanced services definition would not change, other enhanced service providers could continue to provide these services on an unregulated basis.[326]

272. In the *Notice*, we also discussed a fourth alternative wherein we might "delete some or all of the first major clause of the enhanced service definition".[327] We stated that, under this approach, protocol processing could be provided as part of a carrier's basic service offerings or as part of an enhanced service provider's unregulated offerings without affecting the regulatory classification of either service. We noted, however, that such an action might:

> needlessly [expose enhanced service providers] ... to reregulation if their offerings are today unregulated solely because they include functions in the first major clause. We could avoid this result if we were to seek to preempt and deregulate federally the "resale" inherent in their enhanced services as presently defined, to retain the status quo. But, such action is unnecessary to achieve the results in view of the three alternatives .... For this reason, we shall not pursue such an approach.[328]

1. *Positions of the Parties.*

273. We first summarize the positions of commenters that consider the general advantages and disadvantages of the three alternatives. Several parties also devote considerable attention to whether the definition in Section 64.702(a) should be further refined to provide a better delineation of the range of protocols processing applications that carriers can provide as a part of basic service, which is a related issue arising primarily from Alternative 3.

274. Approximately one-half of the parties filing comments in this proceeding address issues related to the treatment of protocol processing. Most of these approve the general concept of permitting carriers subject to structural separation to offer protocol processing on an integrated basis under one of the three alternatives proposed in the *Notice*. Commenters that disapprove of the three alternatives either support the existing *Computer II* framework or prefer other frameworks. Support for Alternative 2,

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[326] *See id.* at paras. 105-111.

[327] *Id.* at para. 88.

[328] *Id.*

Alternative 3, and either Alternative 2 or 3 is evenly divided. Alternative 1 receives minimal support.

275. Local exchange carriers that express a specific preference generally prefer Alternative 3, under which protocol processing would become a basic service when offered by a carrier. For example, Bell Atlantic, BellSouth, PacTel, and Southwest Bell all support this approach. They generally claim that protocol processing is inseparable from the communications function and that such processing can be implemented and offered to the public on a more efficient basis if it can be classified as part of a basic service. Ameritech also supports Alternative 3, but adds that the fourth alternative we alluded to in the *Notice*, in which all or most of the first clause of the enhanced service definition is deleted, might be preferable. Other parties supporting Alternative 3 include Anchorage Telephone, OPASTCO/NCTA, and USTA.

276. In contrast, NYNEX supports Alternative 2, but objects to its joint marketing restrictions and the concept of an efficiency surcharge such as the NURE. In its Reply Comments, NYNEX opposes Alternative 3, claiming that it is inappropriate because protocol processing is essentially competitive and therefore should be treated as enhanced. It argues that the bifurcated treatment of protocol processing in Alternative 3 "would complicate rather than simplify, the application of the basic-enhanced distinction."[329] NYNEX further claims that the successful application of Alternative 3 would require further costly resolution of definitional problems and would delay the offering of first-clause enhanced services by carriers. According to NYNEX, the approach of Alternative 2, which treats all first-clause services as enhanced, and thus subject to uniform regulatory treatment, will facilitate the implementation of such services by carriers.

277. Dobson/Fort Bend prefer either Alternative 1 or 2, claiming that Alternative 3 would result in excessive administrative burdens. For similar reasons, Taconic *et al.* and other rural telephone companies disapprove of the three specific alternatives while supporting the general concept that telephone companies should be able to offer protocol conversion on a collocated basis.

278. Among interexchange carriers, AT&T prefers Alternative 3. ITT, while not explicitly supporting any of the three alternatives, supports the codification of the *Asynchronous/X.25 Order* in Alternative 2, but would retain structural separation for AT&T. MCI states that Alternative 3 has some merit, but suggests that

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[329] NYNEX Reply Comments at Appendix D-5.

the language of a revised rule should be narrowly drafted to limit the scope of protocol processing.

279. GTE supports structural separation and the current regulatory framework and disapproves of any of the alternatives, claiming that it would be premature to remove structural separation from AT&T at this time. It argues that Alternative 3 would give AT&T an "insurmountable competitive advantage over VAN's," because the latter are "principally dependent on AT&T for their underlying transmission capacity, and would be subjected to the very price squeeze which the Commission found to be unacceptable in the *Asynchronous/X.25 Waiver Order*."[330] GTE also questions whether our Alternative 3 treatment of network processing as a basic service when offered by a carrier, and as an enhanced service when offered by a non-carrier, would be legally sound. GTE states:

> It is axiomatic that a service is common carriage 'by virtue of its functions, rather than because it is declared to be so.' *NARUC v. FCC*, 525 F.2d 630, 644 (D.C. Cir.), *cert. denied* 425 U.S. 992 (1976). The functions of network processing do not vary depending on the identity of the offeror.[331]

GTE further claims that, "[t]his particular alternative also would create the problem of potential assertion of State jurisdiction over enhanced services . . . ."[332]

280. ADAPSO, a trade organization representing enhanced service providers, urges that rather than draw distinctions among enhanced services, we should merely codify the *Asynchronous/X. 25 Waiver Order* and extend it to other protocol conversions only under subsequent waiver applications. ADAPSO objects to Alternative 3, claiming that protocol processing is not a "primitive signal processing" function[333] and should remain an enhanced service. According to ADAPSO, since the network processing category of Alternative 3 subsumes certain data processing functions, the Commission's "assertion of Title II authority over 'network processing' is subject to serious questions."[334] Like GTE, ADAPSO questions the legality of the bifurcated regulatory treatment of network processing under Alternative 3. Finally, ADAPSO claims that Alternative 3 will impede the development of the Commission's unbundling policies and may impede the

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[330] GTE Comments at 28.

[331] *Id.* at n. 29.

[332] *Id.*

[333] *See Notice* at para. 81.

[334] ADAPSO Reply Comments at 17.

ability of basic service subscribers to obtain transparent communications services.

281. Tymnet, another enhanced service provider, urges us to maintain the existing Computer II framework, including structural separation. If treatment of the first-clause services is to be changed, however, Tymnet supports the adoption of a modified version of the *Asynchronous/X.25 Waiver Order*, in which Alternative 2 would be narrowed to limit its coverage to certain "primitive" protocol processing functions. Tymnet finds this modification to be necessary because Alternative 2 as presented in the *Notice* would apply to all enhanced services. Tymnet notes that the relationship between enhanced services and "information services" as defined in the *MFJ* is not clear, and asks that we identify as precisely as possible those enhanced services that would be permitted to be integrated into the public switched network.[335]

282. IBM, which supports removal of the existing structural separation requirements after nonstructural safeguards are in place, would maintain the existing enhanced/basic boundary and codify our previous rulings that clarify the definition of "enhanced services". It vigorously opposes the Alternative 3 approach, which it claims would lead to unnecessary re-regulation of protocol processing functions, and argues that all the problems identified by the Commission can be solved through an Alternative 2-type approach. Most other commenters from the equipment manufacturing sector, including CBEMA, EIA, and NATA, also prefer Alternative 2. Northern Telecom, however, in emphatically supporting the relaxation of structural separation, cautions that Alternative 2 might be too restrictive. Furthermore, Siecor, an affiliate of Siemens and Corning Glass that manufactures fiber optics products, prefers Alternative 3 as the best approach to encourage the widespread availability of protocol processing services through the network.

283. User groups that discuss these issues support the removal of structural separation for protocol processing, but vary as to which alternative is preferable. For example, AAR prefers Alternative 2, while ADCU prefers Alternative 3. Moreover, ICA and FEA support the general evolutionary approaches of Part III of the *Notice* rather than the approach of Part II, but do not endorse any one of the particular alternatives. NTIA opposes the

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[335] Other parties supporting Alternative 2 are: ADCU; CSEPA/FBFAA (providers of burglar alarm services); EMA; and TRINTEX (a videotex partnership composed of IBM, Sears, and CBS).

evolutionary concept, claiming that the proposed changes in the basic/enhanced dichotomy would introduce new regulatory uncertainty and delay the far more important objective of eliminating structural separation.

284. State regulatory authorities that address this issue, including those of Arizona and Illinois, as well as NARUC, also support Alternative 3.

285. The commenters also discuss several collateral issues related to changes in the definitional framework.[336] In general, AT&T and the BOCs maintain that the spectrum of the first-clause services they should be allowed to offer on an unseparated basis — either as enhanced services under Alternative 2 or as basic services under Alternative 3 — should be as broad as possible. On the other hand, other parties urge that the scope of first-clause services that can be offered on an unseparated basis by these carriers should be narrowed. For example, Tymnet proposes that the applicability of Alternative 2 be restricted to the protocols contained in the lowest three layers of the Open Systems Interconnection model for data Standards Organization DEC and Xerox also concur with Tymnet in accepting the third level of the OSI Model as a permissable delineator for determining which protocol processing functions may be collocated. AT&T, on the other hand, questions the usefulness of the OSI Model, claiming that the limitation to protocol conversions described by the first three layers is too restrictive.

286. In challenging the usefulness of the OSI Model, NYNEX asserts that: (a) the asynchronous/X.25 protocol processing used in packet switching "actually includes functions in the fourth layer of the ISO/OSI model";[337] (b) the "sixth and seventh layer functions are also involved in protocol formatting";[338] and (c) the lower levels of other protocols do not correspond to the OSI Model. Consequently, NYNEX urges that Tymnet's proposal be rejected. For similar reasons, IBM also rejects the OSI Model concept. Bell Atlantic agrees that protocol conversion could be limited to the first three layers of the OSI Model, but contends that "it would be simpler to define network processing to include only conversions in which the content is not changed, rather than relying on the ISO/OSI model, with its inherent ambiguities."[339]

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[336] *See supra* paras. 268–272.

[337] NYNEX Reply Comments at App. D-9.

[338] *Id.* at n. **.

[339] Bell Atlantic Reply Comments at n. 18.

287. In arguing against the Alternative 3 proposal, Tymnet also claims that in some instances, the processing used in executing the first-clause functions may result in the provisions of second-clause functions (involving the provision of additional, different, or restructured information), which clearly should be regulated. Tymnet cities two examples: (a) a change in the format of the information on the screen of a video display terminal "often conveys valuable information in and of itself"[340]; and (b) "[c]ode sequence translation frequently requires [a further] interpretive analysis."[341] On the other hand, AT&T argues that, in the first instance, "no additional information is, or can be, imparted by placing data in predetermined positions on a terminal screen,"[342] and, in the second instance, a change in the binary code of a specific character to another binary code of the same character has not changed the nature of the transmitted information.

288. Finally, EIA and IBM question our statement in the *Notice*, that "protocols-type" signal processing functions do not have . . . stand-along value [and therefore make] questionable our present treatment of these as non-communications. . . . "[343] IBM claims that "[a] myriad of protocol conversion offerings exists that fall within clause one . . . and that do have stand-along value [independent of common carrier communications]."[344] AT&T, on the other hand, while admitting that some CPE does perform protocol conversion, states that "no commenter has provided an example of protocol conversion being provided as a service except in conjunction with communicating information."[345]

2. *Discussion.*

289. We now consider whether the ground rules concerning provision of protocol processing services need to be modified to provide optimal benefits to the public. The parties addressing these issues generally endorse permitting protocol processing services to be offered on an unseparated basis. We note, however, that by replacing structural separation with nonstructural safeguards, this *Order* would permit protocol processing functions to be offered on an unseparated basis if they continue to be defined as enhanced services. The record does not indicate the extent to

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[340] Tymnet Comments at 31.
[341] *Id.* at 30.
[342] AT&T Reply Comments at 48, n. ***.
[343] *Notice* at para. 82.
[344] IBM Comments at 48.
[345] AT&T Reply Comments at 50.

which the parties that support one or another of the three Alternatives of the *Notice* would perceive a need for additional changes to the regulatory treatment of protocol processing functions given the general results of this *Order*. For this reason, at this time, we decline to adopt any of the Alternatives presented in the *Notice*. Instead, in the *Supplemental Notice* we request comment on whether there is a need for additional modifications of our treatment of protocol processing in light of the changes we have already made in this *Order*. We suggest alternative approaches there that differ somewhat from those proposed in the *Notice* based on our findings in this *Order* that none of the latter would provide a satisfactory regulatory treatment of protocol processing. We shall evaluate these alternatives and their variations within the context of several issues that are central to our concerns.

290. In order to determine whether there is a need to change further the regulatory treatment of protocol processing services by carriers, we will reexamine the essential nature of protocol processing in general and protocol conversion in particular. We will consider whether such functions are best categorized as enhanced services or whether they are essentially "neutral," *i.e.*, functions that by themselves cannot properly be placed in either category, but which can be used in conjunction with either category, but which can be used in conjunction with either basic or enhanced services.

291. Based on these considerations, we seek to determine whether there is a need to further alter our regulatory treatment of protocol processing. We consider which structure would be most compatible with public interest considerations, such as the predictability of regulatory policy as it affects carriers and the providers of enhanced services and telecommunications equipment, the diversity of consumer choice in competitive markets, and possible cost advantages for the consumer.

B. Analysis of Protocol Processing

1. The Functional Nature of Protocol Processing in Communications Offerings

a. Functional Aspects of Protocol Processing

292. In the *Final Decision*, we characterized basic service as "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer

supplied information."[346] We then held that code and protocol conversion are enhanced services, even though we conceded that these services perform functions similar to those of basic service and that "arguments can be made that these functions should be allowed as a part of a communications service."[347] We based our decision primarily on the ground that the regulatory boundary might become distorted if protocol conversion were offered as a part of basic service. We further noted that we had found no evidence that carriers would experience severe losses in efficiency were they to offer these services under the conditions of structural separation. In our *Asynchronous/X.25 Waiver Order*, we subsequently found that structural separation indeed had imposed substantial diseconomies; and based upon that finding, we established regulatory conditions under which the BOCs could offer protocol conversion services on an unseparated basis.

293. The parties in this proceeding comment extensively on definitional issues and the proper boundary between regulated and unregulated services. Although the concept of using the first three layers of the OSI Model to establish such a boundary is widely discussed in the record, no concrete examples that relate a given level of the OSI Model to certain specific enhanced or basic services are given. Apparently this is so because the OSI levels themselves have not been specified with sufficient detail to enable a consensus as to their meaning to emerge in the data communications and data processing communities. We agree with those parties that claim that the OSI Model, at least in its present form, is not an acceptable paradigm for delineating the regulated/unregulated boundary for protocol processing functions.

294. Similarly, we have received little comment on the relationship between the existing definition of protocol processing functions, as contained in the first clause of section 64.702(a) of our Rules, and specific enhanced and basic services. Perhaps the most significant reason for this lack of specificity is that terms such as "protocol," "protocol processing," and "protocol conversion," have not been adequately defined or explained in this and previous proceedings.

295. The word "protocol" is a term of art among data communications engineers that has never been uniquely defined. For the purpose of this proceeding, we shall assume that "protocol" refers to the ensemble of operating disciplines and technical parameters that must be observed and agreed upon by

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[346] *Final Decision*, 77 FCC 2d at 420, para. 96.
[347] *Id.* at para. 99.

subscribers and carriers in order to permit the exchange of information among terminals interconnected in a particular communications network.[348] A subscriber's digital transmission necessarily consists of two components: information-bearing symbols and protocol-related symbols. The information-bearing symbols constitute a subscriber's message. The protocol-related symbols initiate various transmission control functions and also define the format in which the information bearing symbols appear within the composite data stream. "Protocol processing" is a generic term, which subsumes "protocol conversion" and denotes the use of computers to interpret and react to the protocol symbols as the information contained in a subscribers's message is routed to its destination. "Protocol conversion" is the specific form of protocol processing that is necessary to permit communications between disparate terminals or networks. We further develop these concepts and request public comment on them in the *Supplemental Notice*.[349]

296. Under these definitions, we note that the purpose of protocol processing is to provide a subscriber with the equivalent of a transparent, error-free, communications path for the information content of a subscriber's transmission. There are two universal attributes to protocol processing: (a) in general, it entails computer processing applications that necessarily operate upon the format, code, and content of subscriber's transmission; and (b) in so doing, protocol processing attempts to maintain, without any degradation, the original information content of a subscriber's transmission. We also note that protocol processing is not restricted to functions provided by equipment located within a carrier's network. CPE can also perform the conversions necessary to make a given terminal compatible with the protocols used by a network or another terminal. And finally, protocol processing, in the context that we have established, does not have to be performed in connection with common carrier services. For example, it may be also required for interdevice communications, in conjunction with conventional data processing applications,

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[348] The so-called X.25 protocol, for example (which appears as Recommendation X.25 of the CCITT *Red Book*, Vol. VIII, Fascicle VIII.3 (Geneva 1985)) contains a detailed listing of the various technical parameters associated with the "Interface Between Data Terminal Equipment and Data Circuit Terminating Equipment for Terminals Operating in the Packet Mode. . . ." Items in the table of contents include: (a) frame structure at the CPE interface; (b) structure of packets; (c) error handling; (d) procedures for data and interrupt transfer; (e) packet formats; and (f) network user identification. *See* Fascicle VIII.3 at 110.

[349] *Supplemental Notice* at paras. 7-47.

taking place entirely at a customer's premises.

297. Therefore, from a technical, functional perspective, protocol processing may be a neutral function. As such, the regulatory purposes, it could be considered a component of either an enhanced service, or a basic service, depending on the other functions or services with which it is combined. Like switching, it has utility whether it is provided through a common carrier network, an internal corporate network, or through CPE. This characteristic leads us to consider in the *Supplemental Notice* whether protocol processing should be treated as an "adjunct" service for regulatory purposes. If it were so treated, it would be regulated as a basic service when offered as a function that is integrated or collocated with basic services or facilities, and it would be unregulated when offered as part of an unregulated enhanced service or CPE. Such treatment consistent with the approach taken in our *NATA/Centrex Order*,[350] in which we determined that certain computer-implemented features that could be provided by CPE could also be offered under Centrex tariffs as adjuncts to basic service since they serve no purpose beyond facilitating use of basic services.

b. Regulatory Treatment Based on Fuctional Aspects

298. A regulatory approach based on the analysis that protocol processing is a neutral function, which can be provided as an adjunct to either basic or enhanced services, could be implemented by eliminating or modifying the first clause of section 64.702(a) to delete these neutral functions, or some identifiable subset of such functions, from the enhanced services definition. However, none of the three alternatives proposed in the *Notice* contains the feature, although it was included in a fourth alternative that we briefly discussed in the *Notice*, but disclaimed any intent to adopt.[351] Since we did not invite comment on that alternative, we do not have a record upon which we can reach a final conclusion. We realize that the adoption of this approach would raise a number of important issues, and we would like to develop as complete a record as possible on these issues.[352]

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[350] North American Telecommunications Association, *Memorandum Opinion and Order*, ENF No. 84-2, FCC 85-248 (released May 29, 1985) (*NATA/Centrex Order*).

[351] *See Notice* at para. 88; *see also supra* at para. 272.

[352] For example, we recognize, as we did in the *Notice*, that this approach could have certain significant effects on enhanced service providers whose offerings may be treated as not subject to Title II regulation today solely because they include protocol processing functions.

Accordingly, we defer to the *Supplemental Notice* further consideration of whether such a change is desirable.[353]

2. *The Competitive Nature of Protocol Processing In Communications Offerings*

a. Competitive Aspects of Protocol Processing

299. Notwithstanding the foregoing analysis of the nature of protocol processing, which is based on its functional role in facilitating electronic communications, we recognize that protocol processing has been offered on a competitive, unregulated basis since the time of *Computer II*. While we have found convincing the arguments of a large number of parties that the participation of AT&T and the BOCs in offering these functions has been unduly impeded by our structural separation requirements, we also note — as do many parties — that these requirements may be eliminated without changing the status of protocol processing as an enhanced service. The parties that have supported treating protocol processing as a basic service, at least when offered by a carrier, have not presented nearly as convincing a case to date on the efficiencies that could be realized by such a shift in regulatory treatment, as they have on the efficiencies realizable by removing the structural separation restrictions. We are concerned that reimposition of our Title II authority and the possible reimposition of state regulation may be disruptive and counterproductive for those services featuring protocol processing that are being offered to consumers on an unregulated, competitive basis. Moreover, altering the present enhanced services definition could also cause increased regulatory uncertainty. In addition, we recognize that nonstructural safeguards, such as those developed in this *Order* for enhanced services in general, may be preferable to tariff-based regulation and our complaint process as a means of controlling the potential for anticompetitive conduct by AT&T and the BOCs in providing competitive services that utilize protocol processing functions.

b. Regulatory Treatment Based on Competitive Aspects.

300. These factors support retaining the existing enhanced services definition and applying the nonstructural safeguards developed in this *Order* to all protocol processing functions, which still would be treated as enhanced services. This may be the most

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[353] *See Supplemental Notice* at para. 21-35.

pragmatic approach to resolving the regulatory issues we have been considering with respect to protocol processing. In the *Supplemental Notice*, we request comment on: (a) the costs of problems of implementing such safeguards, including CEI and Open Network Architecture, to protocol processing if it continues to be treated as an enhanced service, and (b) on the relative costs and benefits of permitting AT&T and the BOCs to offer protocol processing functions on an unseparated basis, subject either to tariff regulation under the "adjunct service" proposal or nonstructural safeguards under the "enhanced service" proposal. We also request comment on the relative costs and benefits of these approaches as they relate to enhanced service providers.

C. Interim Regulatory Treatment

301. In light of these outstanding issues on the proper regulatory treatment of protocol processing, we think it appropriate to clarify the applicable rules for regulating the provision by AT&T and the BOCs of such services pending the resolution of the issues of the *Supplemental Notice*:

> (1) We shall continue to maintain the current definition of enhanced services during this interim period.
>
> (2) The *Asynchronous/X.25 Waiver Order* shall remain in effect. If AT&T or any BOC not now authorized by that Order to provide asynchronous/X.25 protocol conversion on a collocated basis wishes to do so, it should file a waiver request consistent with the terms of that Order.
>
> (3) The *X.25/X.75 Waiver Order* shall remain in effect and apply to the offering of X.25/X.75 protocol conversion by AT&T and the BOCs.
>
> (4) In order to provide other enhanced services, including other protocol processing functions, on a collocated or integrated basis, AT&T and the BOCs must comply with the nonstructual safeguards, including CEI, described in this Order.

D. Other Specific Changes.

302. In addition to the three alternative treatments of protocol processing proposed in the *Notice*, we requested comment on a few specific changes to the enhanced services definition. In Part III.A. of the *Notice*, we proposed the insertion of the following underlined language at the beginning of the first of the three substantive clauses of Section 64.702(a):

> For the purpose of this Subpart, the term "enhanced service" shall refer to services offered over common carrier transmission facilities used in interstate communications, during any end-to-end communications, which

> employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act.[354]

Our intent was to remove from the ambit of enhanced services those computer processing operations that a carrier performs to (a) set up a call by routing it to its destination, and (b) execute the necessary network management functions that arise when the call is completed.[355] Thus, any code or protocol conversions (or any other computer processing functions) taking place before end-to-end communications have been established or after they have been completed, while a subscriber is interacting only with the network, would be considered to be basic services. If any of the operations cited in the three clauses of Section 64.702 (a) were to take place during end-to-end communications, they would continue to be regarded as enhanced services.

303. In setting forth the three alternative proposals in Part III.B. of the *Notice* for changes in the treatment of protocols processing, we noted that there may be further circumstances in which certain protocol processing functions properly may be offered as part of a basic service, even during end-to-end communications. These are protocol conversions necessitated by the introduction of new technology by a carrier to implement existing network services, and protocol conversion to create internetworking protocols used primarily between and among carriers (and their foreign correspondents).[356]

1. Positions of Parties.

304. The majority of the parties addressing our proposal to add the language "during end-to-end communications" to Section 64.702(a) approve of the proposed change, and several offered suggestions for further clarification. CBEMA and EIA warn that some subscriber-to-network communications could be for the purpose of obtaining enhanced services (such as information processing) rather than for initiating end-to-end communications with another subscriber. They propose the addition of specific

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[354] *Notice* at para. 73.

[355] In the *Protocols Order*, we stated that such functions should not be considered to be enhanced. This rule change would institutionalize that finding.

[356] *Notice* at para. 112. We have established waiver procedures to permit the offering of these conversions in our *Protocols Order* (protocol conversion in connection with new technology) and in our *X.25/X.75 Order* (internetworking). The proposal in the *Notice* would codify the results of these waiver orders.

language that would recognize this distinction. Bell Atlantic suggests that our proposed definition be further modified to include the following underlined language that establishes a specific test — a change in the content of a message — to determine whether the services performed under the first-clause of Section 64.702(a) are basic or enhanced:

> For the purpose of this subpart, the term "ancillary service" shall refer to services offered over common carrier transmission facilities . . . during any end-to-end communications in which the content of the underlying transmission is altered by the provider of such services, which employ computer processing applications that act on . . . .[357]

In its Reply Comments, Ameritech concurs with Bell Atlantic in the use of a test based on the altering of a subscriber's information and further proposes that all of the first-clause services be treated as basic and, therefore, removed from the definition. US West does not support our proposal, claiming that our definitional approach is flawed because technological developments are not driven by such distinctions. NTIA, on the other hand, states that the present definitional structure is adequate and, hence, no futher changes are required. Shooshan and Jackson offer an alternative definition based on the length of time a message is retained in the carrier's network.[358]

305. Finally, no parties object to our proposal that protocol conversion used in internetworking and the introduction of new technology be deemed a part of basic service. NYNEX cautions, however, that the new language should make clear that "enhanced conversions," such as asynchronous/X.25 protocol conversion, would continue to be treated as enhanced services.[359]

2. *Discussion.*

306. Although there has been no significant opposition to our two proposals to refine the first clause of the definition of enhanced service, we shall defer consideration of these to Phase II of this proceeding initiated in the *Supplemental Notice*. In that proceeding, we are undertaking a fundamental reexamination of the regulatory treatment of protocol processing functions, and we think that these proposed refinements to the enhanced service

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[357] Bell Atlantic Comments at Appendix B-3.

[358] Shooshan and Jackson recommend that a specific time threshold be established to distinguish basic and enhanced services. Any protocol processing on messages that remain in the network beyond the threshold limit would be treated as an enhanced service.

[359] *See* NYNEX Reply Comments at App. D-4.

definition should be addressed in the light of that reexamination. For example, we note that if we were to adopt an enhanced service definition in which some or all of the current first clause of Section 64.702(a) is deleted, these refinements could become unnecessary. Furthermore, carriers are currently able to perform the relevant functions pursuant to various waivers.[360] Thus, there should be no untoward consequences from continuing the *status quo* with respect to these functions while the *Supplemental Notice* phase is pending.

VI. VOICE MESSAGE STORAGE SERVICES

307. As we have noted, in the *Reconsideration Order* we classified Custom Calling II VMS services as enhanced services subject to the structural separation requirements.[361] In the subsequent *Custom Calling Denial Order*, we denied a waiver petition by the pre-divestiture AT&T, which would have permitted it to provide Custom Calling II services on an unseparated basis subject to certain proposed nonstructural safeguards.[362] Our decision was based on our belief that if AT&T were not permitted to integrate the VMS feature into its basic service offerings, competition would result in other comparable services being offered and would promote efficiencies that would more than offset those only attainable through fully integrated provision of the services.

308. In the *Notice*, we specifically undertook to reevaluate our regulatory treatment of VMS. It appeared to us that despite our previous expectation that there was a market niche for VMS services that competing service providers would occupy, services comparable to those that AT&T had proposed in its Custom Calling II package generally have not become available to consumers in the years following the *Custom Calling Denial Order*. We requested comment on several VMS issues in the *Notice*,[363] including whether, and on what terms, AT&T and the BOCs should be permitted to provide VMS services on an unseparated basis; whether new forms of interconnection and network architecture make it probable that Custom Calling II-type VMS services may yet be provided by unregulated competitors or bythe BOCs under the existing structural separation requirements; whether VMS services should be regulated

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[360] *See supra* paras. 21–23.

[361] *Reconsideration Order*, 84 FCC 2d at 54–57, paras. 12–18.

[362] *Custom Calling Denial Order*, 88 FCC 2d 1.

[363] *Notice* at paras. 134–140.

under one or more of the alternative regulatory schemes suggested in the *Notice* for protocol processing functions; whether the *Computer II* rules should be changed to permit VMS services to be collocated with, or integrated into, basic service facilities; and whether VMS services should be treated as basic, or as "adjunct to basic," services.[364]

A. Positions of the Parties.

309. A number of commenters strenuously dispute the statement in the *Notice* that enhanced services comparable to those that were the subject of the *Custom Calling Denial Order* are not generally available to consumers. These parties cite telephone answering service bureaus and the availability of CPE, such as telephone answering machines and PBX equipment, as evidence that VMS services are available and being utilized.[365] On the other hand, AT&T and the BOCs agree with our initial assertion that the Custom Calling II services that AT&T originally proposed remain unavailable to consumers today.[366] These services include advance calling, in which consumers record a message and instruct the system as to when and where the call is to be delivered, and "occasional" telephone answering, in which consumers can initiate an answering service on very short notice.

310. Several commenters contend that although some types of VMS services that can be integrated into the network are not available today, new technologies make it likely that they will be offered soon, even if the structural separation requirements are left in place. In particular, the availability of called and calling number identification on a forwarded call is cited as a factor which would lead to improved competitive VMS services.[367]

311. Several other commenters attribute the present lack of VMS services to AT&T and the BOCs, stating that these carriers have failed to make available the centralized billing services and suitable interconnection arrangements that would enable unaffiliated concerns to provide more technologically-advanced VMS

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[364] *Id.* at para. 140.

[365] *See, e.g.*, Gray Comments at 3–4; EIA Comments at 34–35; Lee Reply Comments at Appendix II; ATAE Comments at 16 and Reply Comments at 2–8; Wang Comments at 7; Telocator-RCC Reply Comments at 3.

[366] *See, e.g.*, AT&T Comments at 51–53; Bell Atlantic Comments at 7–9; Southwestern Bell Comments at 6–7; BellSouth Reply Comments at 35–36; PacTel Reply Comments at 48–51.

[367] *See, e.g.*, GTE Comments at 54-58; Cellular Communications Comments at 31; Wang Comments at 8–9; Graphnet Comments at 31.

services.[368] For example, Lee asserts that certain VMS services are unavailable not because of structural separation, but because of marketplace conditions and the refusal of the BOCs to provide the required specialized local switching interfaces necessary to offer such services.[369] ATAE states that its efforts over a three-year period to pursue satisfactory interconnection arrangements with the BOCs have been largely unsuccessful, and it also attributes the lack of Custom Calling II-type VMS services to the unwillingness of the BOCs to provide the necessary interconnection services.[370] Bell Atlantic and BellSouth both respond that they are, and have been, willing to provide suitable interfaces and have been discussing network interface requirements with VMS vendors. They further assert that these opportunities have been available to competitors for years, citing AT&T's offer to provide suitable arrangements for competitors during the *Custom Calling Denial Order* proceeding.[371]

312. A number of commenters, including Lee, GTE, MCI, and RCA, assert that our current structural separation requirements for VMS offerings by AT&T and the BOCs have worked well in promoting competition in this area and should be retained.[372] On the other hand, the carriers subject to these requirements take a contrary position. AT&T, BellSouth, Ameritech, and others support VMS services being offered on an unseparated, resale basis under our "Alternative 1" approach for protocol processing as proposed in the *Notice*.[373] Southwestern Bell and others suggest that VMS be offered as an "ancillary-to-communications" service under tariff.[374] A number of supporters and opponents of structural relief appear to agree that if unseparated VMS offerings are permitted, they should be subject to some type of CEI and other nonstructural safeguards.[375]

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[368] *See, e.g.*, Message World Comments at 1-3; ATAE Reply Comments at 9-13; Telocator-RCC Comments at 4.

[369] Lee Reply Comments, including Appendix II.

[370] ATAE Comments at 15.

[371] *See, e.g.*, Bell Atlantic Reply Comments at 15; BellSouth Reply Comments at 36.

[372] Lee Comments at 15-28; GTE Comments at 4-16; MCI Comments at 15-22; RCA Comments at 15.

[373] *See supra* para. 270.

[374] Southwestern Bell Comments at 55.

[375] *See, e.g.*, IBM Comments at 50; EIA Comments at 24-33; NATA Comments at 33-49; Bell Atlantic Reply Comments at 15; US West Comments at 60-99; BellSouth Reply Comments at 36.

B. Discussion

313. The record amply demonstrates that the Custom Calling II-type VMS services that we discussed in the *Notice* generally are not available to consumers today. It is true that telephone answering machines and telephone answering service bureaus provide types of VMS service that are extremely valuable for many users. However, the distinguishing characteristics of network-based VMS services, such as Custom Calling II, are their ubiquity and their easy availability to casual users. Such services could provide "occasional user" phone answering and advance calling features that generally are not available today, even though the technology to utilize the resources of the basic network to provide such service has existed for some time.

314. An "occasional" phone answering service would permit consumers to order telephone answering service as needed without an initial investment in CPE. For example, a residential customer who normally does not need telephone answering service might desire it on short notice or for a short period of time, *e.g.*, in case of an accident or illness in the family. We cannot and do not predict whether such a service would succeed in the marketplace.[376] It is clear that such services are similar enough to functions available in relatively inexpensive CPE that significant competition will exist. Yet it is possible that a new market will be created for "on demand" or "occasional" phone answering services if sufficient economies are realized through integration of these services with the network and these are reflected in the prices that consumers are asked to pay.

315. Advance calling services, in which a user records a message to be delivered at a later time, also generally are not available except to mass merchandisers that sometimes use CPE to call prospective customers or to deliver particular news to a list of persons. The average residential or small business customer geneally does not have the option of storing a voice message for later automatic delivery. As in the case of "occasional" phone answering service, we need not attempt to determine whether a network-based advanced calling service would be competitively viable. We leave that determination to the marketplace, which is the only arena in which such determinations are properly made. Our concern is to fashion a regulatory framework applicable to

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[376] GTE, for example, contends that these services are not being offered due to a lack of marketplace demand, rather than because of our regulatory structure. *See* GTE Comments at 55.

AT&T and the BOCs that encourages the offering of innovative, useful services to the public. The goals of the Communications Act cannot be said to be well served when consumers do not have access to potentially valuable services that would have been made available but for our regulatory structure.[377]

316. Under the regulatory scheme of this *Order*, VMS will remain an enhanced service subject to the same regulatory treatment as all other enhanced services. Furthermore, none of our proposals in the *Supplemental Notice* would change the classification of services involving subscriber interaction with stored information as "enhanced", as originally determined in the *Reconsideration Order* in *Computer II*. In making this determination we expressly rejected contentions that network-based VMS services, such as Custom Calling II, fall within the "transmission pipeline" concept that we used to describe basic service. Furthermore, in both the *Reconsideration Order* and our later *Custom Calling Denial Order*, we rejected the assertion that these services could be offered efficiently only if they were integrated within the communications network and there is nothing in the record of this proceeding that would lead us to change that view. However, we do recognize that network-based VMS offerings may be an efficient way of providing these services, and our general conclusion that structural separation should be replaced with nonstructural safeguards for enhanced services applies specifically to VMS.

317. In this *Order*, we have established standards for CEI, Open Network Architecture, and other nonstructural safeguards that will be applicable generally to AT&T and BOC provision of enhanced services. These requirements apply to the provision of VMS services as well as other enhanced services. By requiring CEI opportunities for competitors and adequate safeguards to prevent cross-subsidization and discrimination by AT&T and the BOCs, we expect the public to benefit from increased competition

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[377] We note with interest a recent news report that certain Independents are preparing to offer VMS services that are integrated with their basic networks. "Two Telcos Buying Gear to Offer Voice Messaging," February 3, 1986, Communications Week p. 1. We also are aware that the Hawaiian Telephone Company, a GTE-owned operating company, already offers some VMS services under the name "PhonePlus." It would be ironic if the application of structural separation requirements to AT&T and the BOCs were to result in useful network-based VMS services being available only to customers served by the Independents. It is our expectation that the new regulatory scheme adopted in this *Order* will result in all consumers of basic services being able to choose from a number of competing VMS services those that best suit their particular needs.

in the form of new, innovative VMS services that more efficiently use the public switched network.

VII. NETWORK CHANNEL TERMINATING EQUIPMENT

318. The sole CPE issue we raised in the *Notice* concerned the regulation of carrier-supplied Network Channel Terminating Equipment (NCT),[378] which is treated as unregulated CPE under our current rules.[379] The BOCs presently are subject to structural separation requirements in providing NCTE, while AT&T, which was relieved of those requirements for its provision of CPE in the *AT&T Structural Relief Order*,[380] may offer NCTE on an unseparated basis subject to the nonstructural safeguards set out in that *Order*. The Independents are not subject to the structural separation requirements and may provide NCTE on an unseparated basis subject to specific network disclosure requirements[381] and the accounting procedures set out in the *Fifth Report*.[382] Non-carriers may provide NCTE free of regulation. After release of the *Notice*, the Common Carrier Bureau granted waivers to three BOCs, authorizing them to provide NCTE on an unseparated basis subject to accounting requirements pending resolution of the NCTE issues in this proceeding.[383]

319. The *Notice* set forth a number of reasons for raising these issues. We noted allegations by the BOCs that the functions performed by NCTE are more like network functions than CPE functions; that structural separation results in diseconomies in

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[378] NCTE is a generic term for interface devices located on customers' premises to perform functions necessary for using a transmission channel for digital communications. NCTE functions include, but are not limited to, circuit termination, signal conditioning, remote loopback and other testing, multiplexing, and electrical surge protection. Since NCTE provides the interface for connecting terminal equipment to the network, it must be technically compatible with terminal equipment on one side and with the network on the other side. NCTE is often offered separately from terminal equipment, but NCTE functions also may be built into such equipment.

[379] Amendment of Part 68 of the Commission's Rules, 94 FCC 2d 5 (1983) (*NCTE Decision*), *recon. denied*, FCC 84-145 (released April 27, 1984).

[380] Because we released the *Notice* prior to our adoption of the *AT&T Structural Relief Notice*, the *Notice* speaks of structural separation of NCTE with regard to AT&T as well as the BOCs.

[381] *See* 47 CFR § 68.110(b).

[382] *See supra* note 181.

[383] American Information Technologies, Inc., BellSouth Corporation, and Southwestern Bell Corporation, Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations to Enable Certain Bell Operating Companies to Offer Digital NCTE Without Structural Separation, *Memorandum Opinion and Order*, ENF Nos. 84-33, 84-38, 84-60 (released September 11, 1985), *application for review pending* (*NCTE Waiver Order*). We also have pending petitions for similar relief filed by PacTel and Bell Atlantic.

BOC provision and maintenance of NCTE; that carrier provision of NCTE could lead to establishment of standard interfaces for terminal equipment that are independent of loop technology, which might promote network innovation; and that consumers have been experiencing delays in obtaining and maintaining NCTE. We noted that these latter problems had not arisen earlier because we had permitted the BOCs to provide and support digital NCTE on an unseparated basis until June 30, 1984, pending resolution of the issues concerning deregulation of embedded equipment in CC Docket 81-893.

320. In the *Notice*, we explicitly disclaimed any intention to revisit the question whether NCTE should be treated as CPE for purposes of our Part 68 registration rules — that is, we made clear that we are not reconsidering the right of subscribers to supply their own NCTE and interconnect it with the network.[384] We did, however, request comment on whether NCTE or certain NCTE functions, when provided by carriers, should continue to be considered CPE or instead be considered part of network facilities or services. We also solicited comment in the *Notice* on whether structural separation should continue to apply to the BOCs' provision of NCTE if it remains categorized as CPE when provided by carriers. Furthermore, we asked, if the present structural separation requirements are removed, whether NCTE should be provided by carriers as a basic tariffed offering on either a bundled or unbundled basis, or whether carriers should continue to provide NCTE on an unregulated basis except for the imposition of nonstructural safeguards.

321. We also requested comment in the *Notice* on the "multiplexer exception"[385] established in *Computer II*. In the *Notice*, we observed that subscribers typically use multiplexing to break down private lines leased from carriers into individual analog or digital channels, and that such multiplexing can utilize competitively-supplied NCTE or other equipment located on the customer's premises. In the *Final Decision*, we also recognized the efficiencies that carriers can realize by locating mutiplexer equipment on the customer premises to deliver additional channels

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[384] After our *Computer II* determination that NCTE is CPE, we issued technical standards in Part 68 of our Rules to ensure that the public switched network is protected from possible harm caused by the inteconnection of such equipment. Other technical requirements for NCTE are contained in the tariffs filed by the various local carriers. These aspects of NCTE are outside the scope of this proceeding.

[385] *Notice* at paras. 148-52.

ordered by customers instead of installing additional loops.[386] We excluded such carrier-supplied multiplexers from our definition of CPE, thereby exempting them from our structural separation requirements, if they are used for the limited purpose of delivering to the customer the channels it has ordered. This exception does not apply to multiplexer equipment a customer uses on its premises to subdivide a carrier-provided circuit into separate channels. In this case the equipment is treated as CPE.

A. Classification of Carrier-Provided NCTE as CPE.

1. Positions of the Parties.

322. IDCMA, an association of companies that manufacture CPE used in data communications, including NCTE, argues that we have properly classified NCTE devices as CPE, since these devices perform the same functions as other types of CPE, such as modems. IDCMA asserts that NCTE is being supplied successfully as CPE in the competitive marketplace with no harmful effects upon the network and with benefits in the form of greater innovation.[387]

323. A number of carriers view the NCTE functions as "network" functions rather than "CPE" functions and assert that this characterization justifies carrier provision of these functions as part of the tariffed channel. NYNEX, for example, stresses that ubiquitous carrier supply of NCTE would result in channels being supplied with a standard interface that would foster network evolution and innovation.[388] IDCMA replies by urging us to assist in establishing specifications for a standard, nondiscriminatory interface on the network side so that NCTE may be plugged into a standard jack like other CPE.[389] IDCMA also notes that all CPE is dependent upon network technology, which, if changed in fundamental respects, could result in all CPE — not just NCTE — becoming obsolete. It expresses confidence, however, that with notice of impending network changes, as presently required by our rules,[390] NCTE competitors will meet the need for changes in NCTE as networks change. It also noted that about one-third of the NCTE provided by its members is leased rather than sold, demonstrating that the competitive marketplace is providing consumers with opportunities to spread the risk that evolving

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[386] *Final Decision*, 77 FCC 2d at 447 n. 57.

[387] IDCMA Comments at 13-16.

[388] NYNEX Comments at 1-5; Ameritech Reply Comments at 34.

[389] IDCMA Comments at 19-26.

[390] *See* 47 CFR §§ 68.110(b) and 64.702(d).

technology might result in present equipment becoming obsolete. IDCMA also claims that changes to terminal equipment are more likely than changes to the network to make NCTE obsolete. In any event, IDCMA argues that NCTE is usually a small percentage of the cost of upgrading the network.[391]

324. NYNEX, AT&T, and others argue that NCTE, or at least certain types of NCTE, perform functions that are most efficiently performed in the network, and network personnel are the best trained for troubleshooting technical problems that arise.[392] IDCMA contests these assertions, noting that NCTE connects to the network and terminal equipment and must be compatible with both. According to IDCMA, CPE personnel, not network personnel, are more likely to visit a customer's premises to deal with NCTE problems.

2. *Discussion.*

325. In the *NCTE Decision*, we determined that NCTE is most appropriately treated as CPE. In the *Notice* we inquired whether we should reconsider this treatment only with respect to carrier-supplied NCTE. Nevertheless, some commenters focused their arguments more on our treatment of NCTE as CPE generally, an issue we explicitly declined to raise in the *Notice*,[393] than on the proper regulatory treatment of NCTE provided by the carriers. Many of the comments that did focus on this latter issue favor BOC provision of NCTE as CPE on an untariffed, deregulated basis not subject to structural separation. Based on our review of the record, we conclude that it would be undesirable to treat NCTE differently for some suppliers, and therefore NCTE will continue to be provided as CPE by all suppliers. Most of the problems raised in the comments are traceable to the separate subsidiary requirement, not to treatment of NCTE as CPE, and we address this issue below. We therefore affirm our determination in the *NCTE Decision* that NCTE constitutes CPE for our regulatory purposes.

B. Removal of Structural Separation for BOC Provision of NCTE.

1. Positions of the Parties.

326. Several BOCs, such as Ameritech and Bell Atlantic, cite

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[391] IDCMA Reply Comments at 57–63.

[392] NYNEX Comments at Appendix H, p. 1.

[393] *See Notice* at paras. 143, 146 and n. 97.

customer difficulties with obtaining and coordinating installation of NCTE and associated maintenance of the equipment as reasons why the carriers should be permitted to provide NCTE on a structurally unseparated basis.[394] FEA, which procures equipment for federal agency use, concurs in this position, stating that in its attempts to coordinate the provision of NCTE through multiple vendors, it has experienced precisely the sorts of delays and malfunctions we inquired about in the *Notice*.[395]

327. A majority of the other commenters on NCTE issues agree that the BOCs should be permitted to provide NCTE on an unseparated basis.[396] MCI, for example, states that NCTE should continue to be treated as CPE, but that BOC provision of such equipment on an unregulated basis is not objectionable so long as costs do not appear in the revenue requirement for regulated network services.[397] IBM also supports unseparated provision of NCTE by the BOCs if they are subject to nonstructural safeguards at least as strict as those imposed by our waiver orders. IBM asserts that such safeguards should include accounting and nondiscrimination requirements, including the continuance of COGs the BOCs presently maintain to provide a separate point of contact for customers who provide their own CPE.[398] Anchorage Telephone, Siemens, and Southwestern Bell, among others, all agree that if NCTE is permitted to be offered on a tariffed basis, it should be unbundled from network services.[399]

328. Ameritech, among others, notes that because the *MFJ* prohibits the BOCs from manufacturing NCTE, carriers must purchase it from third-party manufacturers and therefore carrier costs are easily determined. This considerably simplifies cost allocation questions.[400] A number of carriers argue that optional BOC provision of NCTE is necessary to assure that new services, such as ISDN, evolve in the most efficient manner.[401] Others argue that consumer inconvenience requires optional BOC provision.[402]

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[394] Ameritech Reply Comments at 35; Bell Atlantic Reply Comments at 13-14.

[395] FEA Comments at 12.

[396] *See, e.g.*, USTA Comments at 65; NTIA Comments at 37-38; Illinois Comments at 9; FEA Comments at 12; Verilink Comments at 16-20; CBEMA Comments at 74-75; Ameritech Comments at 63.

[397] MCI Reply Comments at 71.

[398] IBM Comments at 18-40, 52.

[399] Anchorage Telephone Comments at 21-22; Siemens Reply Comments at 5; Southwestern Bell Comments at 63.

[400] Ameritech Comments at 63-64.

[401] *See, e.g.*, Bell Atlantic Reply Comments at 13.

[402] *See id.* at 13-14.

329. IDCMA, on the other hand, states that all NCTE should continue to be provided through structural separation. IDCMA questions the validity of customer complaints about NCTE provision by competitors.[403]

2. Discussion.

330. We have consistently treated NCTE as a special class of CPE because of its interconnection functions within the communications network. In the *NCTE Waiver Order*, the Common Carrier Bureau accepted BOC allegations that the supply of NCTE in the competitive marketplace was insufficient and causing customer problems with installation and maintenance of digital transmission services.[404] Although IDCMA disputes the claims of the BOCs that users are encountering any special supply, installation, or maintenance problems with NCTE supplied by non-carrier vendors, the record demonstrates that at least in some areas such problems do exist. FEA, for example, in its comments relates its experience as an NCTE consumer that has experienced supply problems and urges us to permit the BOCs to offer NCTE on an unseparated basis.

331. Since we released the *Notice*, events have occurred that directly affect our consideration of whether to permit the BOCs to provide NCTE on an unseparated basis. As a result of replacing structural separation with nonstructural safeguards for AT&T's CPE operations in our *AT&T Structural Relief Order*, that carrier now may provide NCTE on an unseparated basis. Waivers have been granted to three BOCs for provision of NCTE pending our resolution of the issue in this *Order*, and petitions for similar waivers from two other BOCs are now pending.[405] Moreoever, with the release of the *BOC Structural Relief Notice*, we have initiated a comprehensive rulemaking to determine whether the structural separation requirements for BOC CPE operations should be replaced with nonstructural safeguards.

332. In recognition of these events and the fact that the major focus of this proceeding is the provision of enhanced services, not CPE, we will address the question of unseparated BOC provision of NCTE in the *BOC Structural Relief* proceeding, where we are considering the question of general structural relief for BOC

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[403] IDCMA Comments at 7-8, 58-64.

[404] *NCTE Waiver Order* at para. 18. An application for review of the Bureau's decision is pending.

[405] *See supra* note 382.

provision of CPE.[406] This will result in comprehensive and coordinated consideration of the relevant issues. Of course, if certain types of NCTE devices or NCTE generally should receive treatment different from that accorded other CPE devices, that possibility is best handled in that proceeding, where we can consider the characteristics of NCTE in the context of all CPE devices.[407]

C. *Multiplexer Exception*

333. The *Notice* asked whether the multiplexer exception should be modified or clarified because of certain changes in how multiplexing is offered with new digital services to increase network efficiency. Under the present *Computer II* rules, carriers enjoy only a limited exception to the structural separation requirements, permitting them to supply "multiplexers for delivering multiple channels to the customer."[408] The rationale for permitting this limited exception to the deregulation of CPE is that it promotes efficiency by permitting the carrier the option of using available loop bandwidth to supply multiple channels instead of installing additional loop plant.[409] The multiplexing equipment that the carrier provides on the customer's premises to perform these functions cannot also perform the signal conditioning and other functions commonly performed by digital NCTE, which we classify as CPE under the *Computer II* regulatory scheme. The *Notice* discussed problems with applying the multi-

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[406] Accordingly, we are transferring the record of this proceeding insofar as it relates to NCTE to the *BOC Structural Relief Docket*. Since we make no change in our present treatment of NCTE as CPE, this issue is already under consideration in that proceeding. For the same reason, we are postponing any decision regarding the detariffing of "embedded" NCTE until that proceeding is complete, and the Bureau's interim waivers pertaining to such NCTE placed into service between November 18, 1983, and June 30, 1984, also shall remain in effect until we reach a decision in CC Docket No. 86-79. *See* Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), *Fourth Further Notice of Proposed Rulemaking*, CC Docket No. 81-893, para. 34 (released Oct. 21, 1985).

[407] We defer to the *Supplemental Notice* further examination of whether carriers should be permitted to offer on a tariffed basis certain functions such as loopback testing now provided in NCTE if provided on the network side of the demarcation point established in Part 68 of our Rules, *see Notice* at para. 152.d.

[408] *See Final Decision*, 77 FCC 2d at 447 n. 57.

[409] One example of carrier use of multiplexers within our *Computer II* exception is the provision of private telephone service in rural areas over existing loops instead of multi-party-line serivce. *See* International Business Machines Corp., *Memorandum Opinion and Order*, ENF File No. 83-84, FCC 85-292, 58 Rad. Reg. 2d (P & F) 374 (released June 11, 1985); *recon. denied*, FCC 86-122 (released March 25, 1986).

plexer exception to the general rules governing provision of NCTE, and requested comment on ways to clarify or amend the exception in view of new digital services that route multiple channels from the customer's premises to two or more different vendors.

1. Positions of the Parties

334. In its comments, AT&T proposes that we clarify the multiplexer exception by defining "multiplexer" as follows:

> Any equipment, regardless of its location, which provides (i) multiple, individually tariffed and purchased interfaces on the customer side of the equipment and (ii) a multiplexed or concentrated interface on the central office side of the equipment.[410]

According to AT&T, this definition would clarify and more accurately reflect the present scope of the multiplexer exception. However, IDCMA objects to this definition as being overly broad, stating that it could be interpreted to include functions such as signal conditioning and loopback testing that should continue to be offered exclusively in the competitive marketplace.[411]

335. PacTel questions the prudence of fashioning a detailed definition, stating that there is no need to further define "multiplexer" and that, in any event, AT&T's proposed definition is unworkable because evolving digital technology will make it increasingly difficult to determine whether a customer is receiving one tariffed service or channel or more than one. In order to prevent further regulatory confusion, PacTel suggests we simply adopt the following definition of multiplexer contained in the IEEE dictionary: "a device that allows the interleaving of two or more signals to a single line or terminus."[412] It is of the opinion that by doing so our definition will not become obsolete as technology evolves.

2. Discussion

336. While we have received informative comments on the regulatory treatment of the multiplexer exception, we desire additional comment, particularly in light of the CEI requirements for minimization of transmission costs for enhanced service providers that we have established in this *Order* and the possibility that the BOCs may be permitted to provide CPE,

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[410] AT&T Comments at 59.

[411] IDCMA Comments at 88 n. 133.

[412] PacTel Reply Comments at 52–53.

including multiplexers, on an unseparated basis in the *BOC Structural Relief* proceeding. Accordingly, we request further comment in the *Supplemental Notice*[413] on whether we should clarify or modify our *Computer II* mnultiplexer exception in light of the changes to the *Computer II* regulatory regime we have adopted in this *Order* and the changes proposed in the *BOC Structural Relief Notice*.

D. Regulated Offering of NCTE Functions

337. In the *Notice*, we suggested that subsets of NCTE functions, such as circuit termination, signal conditioning, certain types of testing, and multiplexing, might be accorded special treatment.[414] Few parties directly address this portion of the *Notice*. IDCMA asserts that the competitive suppliers have brought to the marketplace a variety of NCTE equipment using innovative technologies. It argues that significant economies of scale would be lost if certain NCTE functions were incorporated in a separate device.[415] On the other hand, in addressing the separate subsidiary requirement, Southwestern Bell notes a particular need for carrier-supplied loopback testing. It advises that limiting relief to the functions set out in the *Notice*, while helpful, would deprive customers of the economies of using a single device and proposes that carriers be permitted to provide all NCTE functions.[416] Bell Atlantic also notes the particular need for carrier provision of loopback testing and other features to eliminate the difficulties with testing and maintenance it has experienced in connection with digital services.[417] Also, AT&T proposes that we enlarge the subset of functions in the *Notice* to include other functions that do not affect the information transmitted by the customer.[418]

338. Most of the comments that we have received regarding carrier provision of a subset of NCTE functions were addressed to removal of the structural separation requirement, and not to carrier provision of such functions on a regulated basis as part of the network. There appear to be technical and efficiency reasons to permit carriers to provide these functions on a regulated basis. In the *Supplemental Notice*, we propose permitting the realization

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[413] *Supplemental Notice* at paras. 70–74.

[414] *Notice* at para. 152.d.

[415] IDCMA Comments at 52–58, 78–79.

[416] Southwestern Bell Reply Comments at 57 n. 101.

[417] Bell Atlantic Reply Comments at 14 n. 21.

[418] AT&T Comments at 59–60.

of these technical advantages and efficiencies by authorizing carriers to provide these functions on a regulated basis if they are offered on the network side of the demarcation point established in Part 68 of our Rules. We will consider comments focused upon this issue in light of our treatment of NCTE as CPE in this *Order* and our proposal in the *BOC Structural Relief Notice* to permit carrier provision of NCTE on an unseparated basis subject to nonstructural safeguards.

VIII. LEGAL CONSIDERATIONS

A. General

1. Positions of the Parties

339. Parties that discuss our authority to implement the proposals of the *Notice* focus principally on proposals that we have decided not to pursue. As we have noted, some commenters argue that the *Notice's* Part II approach would result in improper regulation of competitive, data processing-type services under Title II of the Communications Act.[419] Also, some commenters question the legality of treating "network processing" functions offered by a carrier differently from network processing offered by a non-carrier. However, commenters generally do not question our authority to replace structural separation with nonstructural safeguards.

2. Discussion

340. We find that, as the commenters generally assume, our authority to take the actions discussed in this *Order* is clear under the jurisdictional principles that we relied upon in *Computer II*. In that proceeding, we found that enhanced services are not subject to regulation under Title II of the Act. We based that finding on alternative grounds. First, we determined that enhanced services are not the kind of public undertakings that are considered to be common carriage. In doing so, we contrasted the inherently particularized nature of enhanced services, which are tailored to the needs of individual customers, to the well-established criteria that determine common carrier status, under which a carrier must actually serve the public indifferently or is under a legal compulsion to do so.[420] Second, we found that while some enhanced services could be common carrier activities within

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[419] *See supra* para. 105.

[420] *Final Decision*, 77 FCC 2d at 431, para. 122.

the scope of Title II, the Commission should not adopt a policy of seeking to identify such services in order to subject then to Title II regulation.[421] We found that such a policy could result in numerous adjudications that could lead to unpredictable or inconsistent regulation, which in turn could inhibit innovation.[422] Moreover, we noted that such *ad hoc* proceedings could divert Commission resources from the important tasks of regulating basic services and preventing discrimination in access to common carrier facilities.[423]

341. Despite our expectation that the enhanced services definition of *Computer II* would minimize unpredictable and expensive *ad hoc* determinations of whether specific enhanced services should be regulated as basic, such individualized proceedings have taken place in response to requests for waiver of the *Computer II* rules for specific offerings. Protocol processing functions have been a focal point of such proceedings.[424] Although in the *Protocol Order* we decided to retain such functions in the enhanced services definition, our subsequent experience in considering a number of such services in the context of the *Computer II* waiver proceedings has led us to request additional comments in the *Supplemental Notice* on whether it is necessary in light of our actions in this *Order* to redefine the enhanced service category with respect to such functions.[425]

342. In originally imposing structural separation requirements, we acted pursuant to our authority under section 2(a) of the Communications Act.[426] We replace the structural separation requirements with nonstructural safeguards under the same authority, for our broad discretion in choosing the means by which we regulate is well established.[427] The regulations we impose in place of structural separation are based on our perception of how to best regulate the changing enhanced services

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[421] *Id.* at 434-35, para. 130.

[422] *Id., citing Final Decision*, 77 FCC 2d at 425, para. 107.

[423] *Id.* at 434-35, para. 130.

[424] *Cf., Protocol Order, supra* at note 53; *X.25/X.75 Waiver Order, supra* at note 85; *Asynchronous/X.25 Waiver Order, supra* at note 86; *NATA/Centrex Order, supra* at note 349.

[425] *See Supplemental Notice*, paras. 7-47

[426] 47 USC § 152(a) *See Final Decision*, 77 FCC 2d at 432, para. 124, at 486-87, paras. 261-64; *CCIA v. FCC*, 693 F. 2d at 212-13.

[427] *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 811 (1978); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *National Broadcast Co. v. United States*, 319 U.S. 190 (1943); *FCC v. Pottsville Broadcast Co.*, 309 U.S. 134, 138 (1940); *CCIA v. FCC*, 693 F. 2d at 211-13; *AT&T v. FCC*, 572 F. 2d 17 (2d Cir. 1978).

marketplace, as informed by the experience we have obtained through the eras of *Computer I* and *Computer II* and the voluminous record of this proceeding. The safeguards that we adopt establish a comprehensive regulatory regime that addresses our goal to promote innovation and wide availability of efficient enhanced services.

B. Relations With the States.

343. In the *Computer II* proceeding we preempted the states in two areas concerning enhanced services. First, we determined that since the provision of enhanced services is not common carriage, the efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if such services are free from regulation.[428] Therefore, we preemptively deregulated enhanced services, foreclosing the possibility of state regulation of such offerings. Second, we imposed structural separation requirements of AT&T that the states could not eliminate for intrastate regulatory purposes.[429] Otherwise, we held that "if a state regulatory authority, focusing on the local activities of a carrier, perceives some potential for [anticompetitive] abuse, it may take action so long as it does not conflict with our own policies."[430] Accordingly, states were free to impose structural separation requirements on the unregulated intrastate activities of GTE and other Independents.

344. In the later *BOC Separation Order*, we found that the decision of whether to apply structural separation to the divested BOCs was a federal one, and we preempted the states from altering the structural separation requirements that we imposed on those carriers. We noted that the BOCs would operate on an integrated, multistate basis, so that different state policies concerning structural separation could "confuse BOC business procedures and compound the states' problems in controlling improper cost-shifting."[431] We also noted the federal interest in preventing BOC cross-subsidies because such cost-shifting could interfere with the goal of cost-based access charges for interconnection of interexchange and local exchange carriers. As a result, we found that our requirement of structural separation for the BOCs "forecloses to the states the option to increase or decrease

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[428] *Further Reconsideration Order*, 88 FCC 2d at 541, para. 83 n. 34, *citing Final Decision*, 77 FCC 2d at 428–29.

[429] *Further Reconsideration Order*, 88 FCC 2d at 541, para. 83 n. 34.

[430] *Id.* at 541–42, para 85.

[431] *BOC Separation Order*, 95 FCC 2d at 1131, para. 34.

the separation conditions imposed in [the *BOC Separation Order*]."[432] For similar reasons, we conclude that our imposition of CEI, Open Network Architecture, and the other nonstructural safeguards of this *Order* preempts the states from imposing their own forms of structural separation, or imposing nonstructural safeguards inconsistent with those adopted in this *Order*, with respect to the enhanced services operations of AT&T and the BOCs.

1. *Positions of the Parties.*

345. Several state regulatory commissions argue that we should leave the states significant discretion to regulate specific services in regional markets. For example, California urges that the states retain the authority to determine price levels and terms and conditions of services ancillary to communications (*e.g.*, enhanced services). Arizona supports state discretion to impose full structural separation to ensure equal interconnection for all enhanced services providers. Michigan emphasizes that a substantial portion of enhanced services regulation should be developed by a Joint Board and implemented by the states. NARUC proposes that the states should be able to determine whether to impose structural separation for the provision of intrastate enhanced services by AT&T and the BOCs, in a fashion similar to that permitted under *Computer II* with regard to the Independents. New York, North Dakota, and Michigan argue that states should be permitted to develop their own accounting systems under general Commission guidelines.

346. Other commenters emphasize federal interests. For example, FEA supports Commission preemption of state authority to impose structural separation requirements in order to prevent state interference with the effective end-to-end operation of a national telecommunications system. In this regard, it stresses its concerns in maintaining the efficient operation of nationwide defense-related networks. NYNEX and others argue that states should not have the authority to impose regulatory frameworks that differ from the Commission's. They contend that such differences would perpetuate the diseconomies, uncertainty, and delay that this proceeding seeks to alleviate, and that differing state regulations would prevent services from being introduced because a local exchange company would have to market such services under a standard that meets the most stringent require-

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[432] *Id.* at 1131, para. 35.

ments in its territory. ADAPSO suggests that we permit the states to supplement, but not vary or waive, the safeguards we prescribe. However, it opposes granting the states discretion to develop different accounting standards because of the strong federal interest in accounting as a nonstructural safeguard.

2. *Discussion.*

347. By retaining the existing general regulatory framework for unregulated enhanced services, we do not alter our conclusion in *Computer II* that such services must remain free of state and federal regulation. Our original reasons for deregulating enhanced services are, if anything, more compelling now, as the telecommunications industry in general and the enhanced services market in particular have become increasingly competitive. We consider the replacement of structural separation by nonstructural safeguards to be crucial in promoting the efficiency of the nation's telecommunications services. We have carefully designed these nonstructural safeguards to permit AT&T and the BOCs to provide new, integrated services, to permit competitors to achieve near-equal efficiencies in offering similar products, and to control anticompetitive practices. There is a particularly strong federal interest in permitting all enhanced services providers to utilize efficiently the capabilities of the nation's public switched network in offering their services. If a state were to impose structural separation requirements on intrastate enhanced services provided by AT&T or a BOC, it would directly conflict with this strong federal policy.

348. Consistent with our findings in the *BOC Separation Order*, we note that both AT&T and the BOCs operate on an integrated, multistate basis. As a result, differing state requirements for structural separation would disrupt the planning and procedures of both the enhanced and basic services operations of these carriers. With respect to nonstructural safeguards, variations among states that are inconsistent with the safegurards we have adopted would have similar disruptive results.[433] In this context, to permit application of inconsistent regulatory requirements to the provision of interstate and intrastate enhanced service offerings would be impracticable and would effectively negate federal

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[433] For example, if different states that a BOC serves choose to supplement or relax our CEI or Open Network Architecture requirements in different ways, the BOC could face considerable additional expense in designing a service, which would result in higher prices to users or unavailability of the service.

policies.[434] Therefore, we preempt the states from applying to the enhanced service operations of AT&T and the BOCs any structural separation requirements, and any nonstructural safeguards inconsistent with those adopted in this *Order*.[435] We find that our authority to preempt such state regulations is supported by the court decision upholding our decision in *Computer II* to deregulate the provision of enhanced services by common carriers and others.[436] We emphasize, however, that although we specify some terms and conditions on the provision of CEI and Basic Service Elements, the basic services involved in such offerings are to be tariffed in the appropriate federal or state jurisdiction.[437]

C. *International Applicability.*

1. *Positions of the Parties.*

349. Several commenters address international aspects of this proceeding, focusing on the *Notice*'s Part II approach that proposed a new regulatory framework. Some express concern that the Part II approach, even though merely a proposal, may be misconstrued by other countries as an indication that the pro-competitive policies of *Computer II* have failed. According to the commenters, by proposing the entirely new framework of the Part II approach, the Commission, and through it, the United States, is seen as reversing its policies of promoting liberal competition.[438]

350. ICA, ADCU, ADAPSO and others request that we expressly consider and address the international ramifications of our conclusions in this proceeding. They recall the disputes concerning application of the *Computer II* rules to the international arena,

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[434] *See North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976); *see also Mobile Radio*, 93 FCC 2d 908, 922 (1983), *aff'd*, *NARUC v. FCC*, D.C. Cir. No. 83-1485 (Jan. 17, 1984).

[435] In this *Order*, we do not preempt the states' authority to impose structural separation or other safeguards on the enhanced service activities of the Independents, although we propose such preemption in the *Supplemental Notice*.

[436] *See CCIA v. FCC*, 693 F.2d at 210-212.

[437] Furthermore, as discussed in the *Supplemental Notice*, the reclassification of protocol processing functions as being regulable under Title II, which is proposed therein, could permit state regulation of them if offered as intrastate services.

[438] *See, e.g.*, USCIB Comments at 3; Xerox Reply Comments at 29-30, *see also* Letter from D.L. Dougan, U.S. Department of State, to M.S. Fowler, Federal Communications Commission (Received Jan. 29, 1986) (State Department Letter).

resulting in the *Telenet Order*[439] and the *Telenet Reconsideration*[440] that established the international applicability of the enhanced/basic service dichotomy. ADAPSO argues that because the *Notice* did not specify the intended application of its proposals, we should expressly solicit comment on their international ramifications. GTE states that since the *Notice* does not expressly consider the applicability of its proposals to international enhanced services, GTE's comments do not address international issues. NTIA asks for clarification of the relationship between this proceeding, the *International Competitive Carrier Order*,[441] and the *International Resale* proceedings.[442]

2. *Discussion.*

351. The policies we adopt in this *Order* are further developments in our long-standing program of regulatory liberalization seeking to advance efficiency in telecommunications by eliminating unnecessary regulation and creating a competitive environment for telecommunications services. In this proceeding, we have retained the general enhanced and basic service framework of *Computer II* and reaffirmed the unregulated status of enhanced services. By removing structural separation for AT&T and the BOCs, we shall eliminate an intrusive form of regulation aimed at protecting competitive enhanced service markets. By allowing these carriers to offer such services subject to less burdensome safeguards, such as CEI, accounting and nondiscrimination requirements, we will advance the competitive nature of the enhanced services markets. The policies we adopt here reflect our general conclusion that competitive markets, where applicable, are the best means to further public benefit in the provision of telecommunications pursuant to our statutory mandate.

352. We tentatively conclude that the regulatory treatment of basic and enhanced services that we adopt in this *Order* applies internationally as well as domestically. This treatment is a continuation of our baseline policy announced in *Computer II* that

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[439] GTE Telenet Communications Corporation — Tymnet Inc., *Memorandum Opinion and Order*, File Nos. I-T-C-81-274; 82-210, 91 FCC 2d 232 (1982) (*Telenet Order*).

[440] GTE Telenet Communications Corporation — Tymnet Inc., *Memorandum Opinion and Order*, 100 FCC 2d 776 (1985) (*Telenet Reconsideration*), *appeal pending*, No. 83-2207 (D.C. Cir., filed Oct. 7, 1983).

[441] International Competitive Common Carrier Policies, *Report and Order*, CC Docket No. 85-107 (released Nov. 15, 1985).

[442] Regulatory Policies Concerning Resale and Shared Use of Common Carrier International Communications Services, *Notice of Proposed Rulemaking*, CC Docket No. 80-176, 77 FCC 2d 831 (1980).

"[t]he basic/enhanced dichotomy is applicable to both domestic and international services provided over common carrier facilities."[443] As a result, the replacement of structural separation with nonstructural safeguards for AT&T and the BOCs should apply for any present or future international enhanced services of those carriers. We strongly believe that this *Order* is consistent with the specific Commission decisions on international matters to which commenters refer, as well as with our overall international telecommunications policies. However, because we did not specifically request comment in the *Notice* on the international aspects of our proposals, in the *Supplemental Notice* we further discuss our reasons for these conclusions and request comment on the international applicability of the policies we adopt in this *Order*. We emphasize that we shall not reexamine any issues already resolved in the *Telenet Order* and the *Telenet Reconsideration* that apply to this *Order*.

IX. REGULATORY FLEXIBILITY CERTIFICATION

353. This *Order* replaces structural separation with nonstructural safeguards for the provision of enhanced services by AT&T and the BOCs. We conclude that none of these carriers are small business entities for purposes of the Regulatory Flexibility Act, 5 USC §§ 602-12.

X. ORDERING CLAUSES

354. Accordingly, IT IS ORDERED, That pursuant to Sections 4(i), 4(j), 201-205, 218, 220, 403, and 404, of the Communications Act of 1934, 47 USC §§ 154(i), 154(j), 201-205, 218, 220, 403, and 404, the policies, rules, and requirements set forth herein ARE ADOPTED.

355. IT IS FURTHER ORDERED, That the motions for leave to file late comments filed by the Electronic Mail Association, the North American Telecommunications Association, United Cable Television Corporation, the Vermont Public Service Board, McCaw Cellular Communications, Inc., United Telephone Systems, and the North Dakota Public Services Commission ARE GRANTED.

356. IT IS FURTHER ORDERED, That the action on delegated authority of the Chief, Common Carrier Bureau, in granting the Petition of the American Telephone and Telegraph Company for Limited and Temporary Waiver of 47 CFR Section 64.702

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[443] *Further Reconsideration Order*, 84 FCC 2d at 53, para. 9 n. 4.

Regarding Its Provision of Unregulated Services Externally to the AT&T-C Network, IS AFFIRMED, and the Petitions for Review of that action filed by GTE Corporation and ADAPSO ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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nonstructural safeguards for AT&T and the BOCs should apply for any present or future international enhanced services of those carriers. We strongly believe that this *Order* is consistent with [illegible] international matters to which commenters refer, as well as with our overall international telecommunications policies. However, because we did not specifically request comment in the *Notice* on the international aspects of our proposals, in the *Supplemental Notice* we further discuss our reasons for these conclusions and request comment on the international applicability of the policies we adopt in this *Order*. We emphasize that we shall not reexamine any issues already resolved in the *Telenet Order* and the *Telenet Reconsideration* that apply to this *Order*.

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[illegible] *Further Reconsideration Order*, 84 FCC 2d at 53, para. 5 n. 4.